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38

July 3,

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF  
TERRITORY OF IDAHO.

By SOL. HASBROUCK.

(Ex-officio Reporter.)

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v. 2

VOLUME 2.

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CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF THE  
TERRITORY OF IDAHO.

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(September 14, 1881.)

CALDWELL v. RUDDY.

[1 Pac. 339.]

**OBJECTIONS TO ANSWER IN THE SUPREME COURT.**—An objection that an answer does not contain facts sufficient to constitute a defense may be made in the supreme court for the first time.

**SAME.**—If, however, the answer contains any defense, the objections must be overruled.

**ANSWER—INCONSISTENT DEFENSES—DEMURRER—MOTION TO STRIKE.**—An objection that the answer contains inconsistent defenses cannot be made by demurrer, but by motion to strike out, or to require the defendant to elect upon which defense he will stand.

**IMPROVEMENTS — PUBLIC LANDS — SALE — CONSIDERATION.**—Improvements upon the public lands are lawful subjects of sale and are a sufficient consideration to support promissory notes and other contracts.

**DEFENSE—INADEQUACY OF CONSIDERATION.**—Inadequacy of consideration is no defense to an action on a promissory note unless there was fraud also on the part of the promisee.

**VOIDABLE CONTRACT—INSANE PERSON—PERSONAL PRIVILEGES.**—The contract of an insane person is merely voidable, not absolutely void. The right to avoid it is a personal right which can only be exercised by the insane person, or his guardian, or legal representatives. Other parties to the contract who are of sound mind are not affected until it is avoided by the party entitled to disaffirm it.

**AVOIDING CONTRACT—RETURN OF CONSIDERATION.**—The insane person may not disaffirm his contract without returning the consideration.

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Argument for Respondent.

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**SURETY—COMPETENCY OF PRINCIPAL.**—A surety to a promissory note is deemed to contract that the principal maker is in every way competent to contract in the way he has done.

(Syllabus by the court.)

**APPEAL** from District Court, Nez Perce County. **Reversed.**

The facts are sufficiently stated in the opinion.

A. E. Isham, for Appellant.

The answer does not state facts sufficient to constitute a defense, and may be raised in supreme court for first time, citing *Haskell v. Moore*, 29 Cal. 437. The averment of tender in the answer is insufficient, as there is no allegation that the tender was kept good. (*Jouett v. Wagner*, 2 Bibb, 269, 5 Am. Dec. 602; *Estee's Pleading*, 11, 140, 746; *Redington v. Chase*, 34 Cal. 666.) The answer contains inconsistent defenses. (*Derby v. Gallup*, 5 Minn. 119; *Auld v. Butcher*, 2 Kan. 135; *Hensley v. Tartar*, 14 Cal. 508; *Kuhland v. Sedwick*, 17 Cal. 123; *Bell v. Brown*, 22 Cal. 671; *Baird v. Morford*, 29 Iowa, 531; *Adams v. Trigg*, 37 Mo. 141.) There are no facts set up which constitute fraud on this point. (See *Tissot v. Throckmorton*, 6 Cal. 471; *Bigelow on Frauds*, 409; *Chitty on Contracts*, 4th ed., 528; *Bigelow on Estoppel*, 437, 467; *McMurray v. Gifford*, 5 How. Pr. 14; *Bigelow on Frauds*, p. 64 sec. 4; *Walker v. Sedwick*, 8 Cal. 398; *Houseman v. Chase*, 12 Cal. 290; *Blen v. Bear River Water etc. Co.*, 20 Cal. 602, 81 Am. Dec. 132; 2 United States Digest, 707 (N.), 582.) The plea of tender admits the contract. (2 *Parsons on Contracts*, 5th ed., 638.)

Huston & Gray, for Respondent.

The evidence is not properly before the court that plaintiff should have moved for new trial, and if refused, appealed from order and embodied evidence in bill of exceptions. (*Jones v. Shay*, 50 Cal. 508; *Watson v. San Francisco etc. R. R. Co.*, 50 Cal. 523.) The answer set up the following defenses: 1. Denial of partnership of defendant and Michael Ruddy, deceased; 2. Partial want of consideration; 3. Tender and payment; 4. Fraud—all of which may be plead in the same action, and in this case were part of the same transaction.

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Opinion of the Court—Prickett, J.

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(*Campbell v. Wright*, 21 How. Pr. 9; *Meyer v. Van Collem*, 7 Abb. Pr. 222; *Durant v. Gardner*, 10 Abb. Pr. 445; *Bell v. Brown*, 22 Cal. 671.)

PRICKETT, J.—This action was brought by the plaintiff against the defendant, in the district court, upon two joint and several promissory notes, alleged to have been executed by the defendant and one Michael Ruddy, deceased. Each of said notes are for the sum of \$2,646.38, both dated March 7, 1872—one due October 15, 1872; the other, October 15, 1873. Also upon an account for \$303.34. Upon the first-mentioned note is credited \$1,554.13, January 15, 1873. The defendant's amended answer consists of ten subdivisions, each of which was, no doubt, intended as a complete or partial defense to the said several causes of action, or to some one or more of them. Such proceedings were had in the district court as resulted in the striking out of the seventh and ninth subdivisions of the answer. The plaintiff demurred in the court below to the amended answer, alleging as objections that the second and third subdivisions are inconsistent with the tenth, and that the sixth and eighth paragraphs are inconsistent with each other; and also specially demurred to the tenth paragraph, on the ground that it constitutes no defense to the action. The district court overruled the demurrer, and the plaintiff excepted to that ruling. The cause being tried by a jury, a verdict was rendered for the defendant, whereupon a judgment was rendered against the plaintiff for costs. From that judgment the plaintiff appealed to this court. Much of the matter contained in the transcript was stricken out on motion, because it constitutes no part of the record, not being made such either by the statute, or by bill of exceptions or statement.

The case as it now stands is to be reviewed upon the judgment-roll alone, which consists of the complaint, amended answer, the demurrer to the answer, and the decision of the court thereon, and the exception of the plaintiff thereto, the verdict, and the judgment.

The plaintiff and appellant claims that he is entitled to a reversal of the judgment of the district court on the ground that the amended answer does not set forth a defense to any of the causes of action alleged in the complaint. This brings us to

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Opinion of the Court—Prickett, J.

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a consideration of the answer as upon a general demurrer to the whole thereof on the ground just stated. This objection may, no doubt, be raised in this court for the first time; but, in determining it, we must be governed by the same rule that the district court would have been had it been raised there, which is that, if there is any defense contained in the answer, the objection must be overruled. Upon an examination of the amended answer we find that the sixth subdivision thereof is as follows: "For a further and separate defense, avers that the said notes and accounts have been fully paid." This, if true—and it is admitted to be so, for the purposes of this objection—constitutes a full and complete defense to all of the several causes of action set forth in the complaint, and this general objection to the answer as a whole must be overruled.

We now proceed to an examination of the written demurrer interposed in the district court, and to review the decision of that court thereon. The first two subdivisions of the demurrer will be considered together. The language of the demurrer is that several defenses have been improperly united, but the objection urged on the argument is that the second and third paragraphs of the answer are inconsistent with the tenth, and that the sixth and eighth paragraphs are contradictory and inconsistent with each other. And the specifications of the particulars, as contained in the demurrer, clearly show that the real grounds of the objection are based upon an alleged inconsistency between the specified portions of the answer, and not upon an improper joinder of defenses. An objection that a pleading contains inconsistent allegations or denials cannot be made by demurrer. The grounds upon which a party may demur are specified and enumerated in the statute, and he must be limited to the statutory grounds. That a pleading contains inconsistent allegations or defenses is not one of these grounds. When this objection exists it should be taken advantage of by motion to strike out, or to require the party pleading to elect between them. The first and second subdivisions of the demurrer were therefore properly overruled.

The third subdivision of the demurrer is directed to the tenth paragraph of the answer. It is in effect an objection that that paragraph does not contain facts sufficient to constitute a de-

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Opinion of the Court—Prickett, J.

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fense to any of the causes of action set forth in the complaint, and it specifies the particulars in which it is claimed to be deficient. The tenth paragraph of the answer is as follows: "For a further and separate defense defendant avers that the said notes were procured from the said Michael by the said plaintiff by fraud and misrepresentation; that the pretended consideration for said notes was certain improvements upon a certain piece or parcel of government land in said county; and the defendant alleges that the said plaintiff, in order to secure the execution of the said notes by the said Michael, and well knowing that the said Michael was then sick, and was laboring under both physical and mental derangement, which rendered him wholly incapable to transact his own business, falsely and fraudulently represented to the said Michael that he was the owner of the said lands and the improvements thereon, and that the same was then worth the sum of the said notes; and the said Michael at that time was the father in law of the said plaintiff, and had full confidence in, and fully believed all the representations made by, the said plaintiff, and was thereby induced to sign the said notes; and the defendant alleges the fact to be that the said land and improvements were not worth the said amount, or any amount in excess of \$1,600, and that the said plaintiff well knew the same; and defendant avers that the said plaintiff was not the owner of the said land or improvements, or any portion thereof more than one-half of the same, and plaintiff well knew the same at the time; and defendant avers that the most, if not all, of said improvements were made by one James Pierson, and that he, said Pierson, was the owner of at least one-half thereof—all of which was well known to said plaintiff."

This portion of the answer is clearly intended to show illegality in, or failure of, consideration, either in part or in whole, for the promissory notes alleged to have been made by the defendant and his deceased father, Michael Ruddy, in his lifetime, and fraud on the part of the plaintiff in procuring the execution of the notes by the said Michael Ruddy; but it is wholly insufficient for either purpose. The sale of improvements upon the public lands of the United States is not prohibited by any law, neither is it against sound morals, public policy, or public inter-

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Opinion of the Court—Prickett, J.

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ests; and there is no reason why they may not be proper subjects of sale, and serve as actual value and valuable consideration for promissory notes and other contracts.

It is apparent that an entire want of consideration is not relied upon as a defense, because it is admitted by defendant that the land and improvements sold were worth the sum of \$1,600. The defendant does not say that his father did not get all the property for which the notes were given, but, in effect, that it was not worth the price agreed to be given therefor. This is merely alleging inadequacy, not failure, of consideration. This is no defense, unless there was also fraud on the part of the plaintiff in inducing the purchaser to believe it to be of greater value, which we shall presently consider. It is not the duty of courts to relieve parties from the obligations of their contracts, fairly made, because they are disadvantageous or foolish, but to enforce them. Courts, both of law and of equity, refuse to disturb contracts on grounds of mere inadequacy, whether the consideration is of benefit to the promisor or of injury to the promisee. (1 Parsons on Contracts, 436.)

It is alleged in this portion of the answer, it is true, that the plaintiff was not the owner of more than one-half of the improvements sold to Michael Ruddy, but that one James Pierson was the owner of at least one-half thereof; but it is a sufficient answer to this allegation that it nowhere appears that said Michael Ruddy in his lifetime, or his heirs or representatives, have ever been disturbed in their possession of the property, or that Pierson has ever asserted any rights thereto; but even if he had done so, and the purchaser had been actually evicted from a portion of the premises and improvements, he could not avoid payment of the notes without first surrendering or offering to surrender the remainder to the plaintiff, so that both parties might be remitted to their original rights.

Upon the question of mental incapacity of Michael Ruddy to make the notes, it is sufficient to say that this constitutes no defense in favor of this defendant. The contract of an insane person is voidable only, not absolutely void. (2 Blackstone's Commentaries, 291; 2 Kent's Commentaries, 6th ed., 451.) The right to avoid it is a personal right, which can only be exercised by the insane person, or his guardian or representatives. The

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Opinion of the Court—Prickett, J.

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contract is binding upon the party who is of sound mind, and his liability is not affected until it is avoided by the party entitled to disaffirm it. Nor could Michael Ruddy have disaffirmed the note on this ground without returning the property. A person may not disaffirm or rescind a contract and yet retain any portion of the consideration. The only exception to this rule is when the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser cannot derive any benefit from a purchase and yet rescind the contract. It must be nullified *in toto* or not at all. It cannot be enforced in part and rescinded in part. And if the property would be of any benefit to the seller he is equally bound to return it. He who would rescind a contract must put the other party in as good a situation as he was before; otherwise he cannot do it. (Chitty on Contracts, 276.) And so, as to all the other allegations intended to show fraud, the same rules and principles apply. One of the two joint and several makers of a promissory note cannot defend on the ground that the signature of the other maker was procured by fraud. If, as is alleged, the defendant as a matter of fact executed the notes as surety for Michael Ruddy, then his standing is in no respect better, for a surety, guarantor, or indorser of a promissory note is deemed in law to contract that the principal maker of the note was in every way competent to contract in the manner he has, and that the instrument is a binding obligation upon said maker.

This subdivision of the answer does not contain facts sufficient to constitute any defense to the notes, and the demurrer thereto ought to have been sustained by the district court, and for that reason the judgment must be reversed and the cause remanded.

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Opinion of the Court—Morgan, C. J.

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(September 14, 1881.)

SCHNEIDER v. HUSSEY.

[1 Pac. 343.]

**PASSAGE OF ACT—APPROVAL BY GOVERNOR—STATUTORY CONSTRUCTION.**

The words "passage of the act" in a statute mean its approval, or the time when the act takes effect.

**ACTIONS—LIMITATIONS—BAR OF STATUTE.**—An act limiting the time within which an action may be commenced provided that causes of action which had theretofore accrued might be commenced within the whole time allowed by the statute after its passage. *Held*, that the bar of the statute did not begin to run until the statute took effect.

**LIMITATION OF ACTIONS—DOUBT RESOLVED IN FAVOR OF CREDITORS.**—

It is a well-settled rule that when there is doubt as to the time when the limitation of an action begins to run under a statute, that construction must be given which is most favorable to the common-law rights of the citizen.

**APPEAL** from District Court, Idaho County. Affirmed.

J. Brumback, for Appellants.

Huston & Gray, for Respondents.

No briefs can be found on file with the record of this case.

**MORGAN, C. J.**—This action was brought on a promissory note given by defendants to the plaintiffs, a copy of which appears in the complaint filed in the court below. The note was dated October 31, 1874, and was due on demand. Suit was commenced on the same, February 28, 1880. Defendants plead the statute of limitations. Plaintiffs moved for judgment on the pleadings, which motion was allowed by the court, and judgment entered accordingly for the amount of the note, interest, and costs. From that judgment, defendants take an appeal to this court.

The question whether this action was barred by the statute of limitations depends upon the construction to be given to the language contained in section 2 of said act, which states that "when the cause of action has already accrued, the party entitled and those claiming under him shall have, after the passage of this act, the whole period herein prescribed in which to com-



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Opinion of the Court—Morgan, C. J.

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mence an action"; which period, at the time of the commencement of this suit, was five years. The question is as to whether the words "passage of the act" mean when it is signed by the governor, or when by law the act goes into effect. The first section of the act of January 15, 1875, fixes the time when this act, among others, takes effect, which is July 1, 1875. It will not be contended that one section of an act will take effect or be in force at any earlier date than other sections unless the act itself shall so state. There is no clause in this act providing that this section shall take effect sooner than any other section of the same act. This section, therefore, and no clause of it, can take effect until the first day of July, 1875. The words "passage of the act," while they have a technical meaning which is well understood, in this connection and as used in the section referred to, must be held to mean the time when the act takes effect. Any other construction of the words would give life and action to this section before it can have any such life. The same construction of these words was given in the case of *Rogers v. Vass*, 6 Iowa, 408. The court there say: "A prominent objection made by the defendant is that the right of pre-emption was taken away by the act of 24th of January, 1857, which repealed all prior acts allowing a pre-emption on the swamp lands, but with a proviso saving all actual settlers on said lands at the time of the passage of the act. As the act was passed in January, and the petitioner began his improvement in June, the defendant insists that the former acquired no right of pre-emption, he not being a settler at the passage of the act. But the objection is not well founded. This, and similar expressions in statutes, has legal reference to the time of their taking effect. No other construction would be consistent with that requirement of the constitution, which provides that the laws shall be published before they take effect." It is also the well-settled rule of courts that when there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizen.

The judgment of the court below is therefore affirmed.

## Argument for the People.

(September 14, 1881.)

## PEOPLE v. McDONALD.

[1 Pac. 345.]

**INSTRUCTIONS—MALICE—MURDER.**—An instruction that “malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart” is not objectionable under a statute which provides that “malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.”

**SAME.**—It is not necessary to give an instruction in the exact language of the statute, and it would be erroneous, in some cases, to do so; it is sufficient if the substance is correctly given.

**APPEAL** from District Court, Owyhee County. **Affirmed.**

Alanson Smith, for Appellant.

The court erred in defining the crime of murder. When the court instructs the jury to find that the circumstances of the killing showed an abandoned and malignant heart from *some* or *any* of the circumstances, while the statute requires them to find it from *all* the circumstances, the instruction is erroneous. Where considerable provocation appears, there is no implied malice. It must appear that there was malice aforethought, either express or implied, to support a verdict of murder of any degree. (2 Bishop's Criminal Law, 6th ed., 675, 697.) The defendant should be found guilty of the lesser offense, to wit, murder in the second degree, where the verdict is found upon a presumption of guilt arising from the evidence, or upon the conclusive implication of malice. (*People v. Walter*, 1 Idaho, 386; *Johnson v. Commonwealth*, 24 Pa. St. 386; *State v. McCormick*, 27 Iowa, 402; *People v. Gibson*, 17 Cal. 283, and cases there cited.)

Thomas D. Cahalan, for the People.

If the judge is not asked to charge the jury on a particular point at the trial, it is not error if he omits to do so. (*Hall v. Weir*, 1 Allen, 261; *Burns v. Sutherland*, 7 Pa. St. 103; *Davis v. Elliott*, 15 Gray, 90; *Jones v. State*, 20 Ohio, 34; *Bain v. Doran*, 54 Pa. St. 124; *Tomlinson v. Wallace*, 16 Wis. 224-235; *Pennock v. Dialogue*, 2 Pet. 1; *Koehler v. Wilson*, 40 Iowa, 183; *Miller v. Bryan*, 3 Iowa, 58; *People v. Haun*, 44 Cal. 96.)

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If the court cannot give instructions without modifying the same, he may refuse to give them. (*Bevan v. Hayden*, 13 Iowa, 122-127; *Grimes v. Martin*, 10 Iowa, 347; *Carpenter v. Stilwell*, 11 N. Y. 61-79; *Lucas v. Brooks*, 18 Wall. 436; *Hodges v. Cooper*, 43 N. Y. 216; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291.) The court may refuse to give instructions asked where it has already instructed fully on those points. (*Kelly v. Jackson*, 6 Pet. 622-628; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291, 295; *Jones v. Jones*, 71 Ill. 562; *People v. Murray*, 41 Cal. 66; *People v. Kelly*, 28 Cal. 423; *People v. Strong*, 30 Cal. 151; *People v. Williams*, 32 Cal. 280; *State v. O'Connor*, 11 Nev. 416; *State v. Waterman*, 1 Nev. 543.)

MORGAN, C. J.—Defendant was indicted, tried, and convicted of murder in the first degree. The first point urged upon the attention of the court, and which seems to be relied upon by the appellant as the main point, or as the only ground upon which he asks a reversal of the judgment below and an order for a new trial, is “that the court erred in the instruction giving the definition of murder, or in the direction as to when malice is to be implied. The language of the statute is that malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.” The language of the court in the instruction is: “Malice is always to be implied when the circumstances of the killing showed an abandoned and malignant heart.” The language of the statute is in the alternative, and is equivalent to the following: Malice shall be implied either when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart; that is, in either case malice shall be implied. It is proper, then, that the court should give either cause for the implication that may, in his judgment, be applicable to the evidence.

The question remains, then, whether leaving out the word “all” makes such a change in the statute as to mislead the jury. It is proper, first, to inquire what kind of an error or omission would authorize an appellate court to reverse a judgment of a court below and direct a new trial. It is not error to give general instructions, and if an omission occurs in a general instruction, unless it actually misleads the jury and procures a wrong verdict, it cannot be assigned for error. Thompson, in his work

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on Charging the Jury, section 81, says a party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time, and cites a large number of authorities running through the reports of a number of the states. Neither is it sufficient if there is a mere tendency in the instructions to mislead the jury; in such a case also the defendant must ask additional explanatory instructions in order to avail himself of the defect in a court of error. (Thompson's Charging the Jury, sec. 82; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162.) A proper jury is composed of men of sound judgment and ordinary intelligence. It cannot be supposed that such men would infer from this instruction that they were to take a part of the circumstances and from these imply malice; such men would know that, when the court said the circumstances of the killing, all the circumstances were intended, and not a part.

It cannot be said, and it is not said, by the appellant that this instruction in the form given misled the jury, and it can scarcely be said that it had a tendency even to mislead the jury. The word "all," in the connection used, is a word of emphasis only, and is not in any sense essential to the completeness of the direction. The court is never required to give instructions in the exact language of the statute; it would be in some cases erroneous to do so; it is sufficient if the substance is correctly given. When all the instructions are taken together no improper inference can be drawn. The jury are repeatedly, and in differing language, charged that every reasonable doubt arising from the evidence must be resolved in favor of the defendant. This reasonable doubt is defined in the instructions to be not speculative in its nature, but a real uncertainty, and a wavering of the mind after consideration of all of the evidence; and the concluding clause of the instructions of the court is, "You will carefully consider all the facts and circumstances of the case as detailed by the evidence." The different degrees of murder and manslaughter are also clearly defined.

The six instructions refused had been substantially and fully given by the court. These six instructions are clearly bad on account of their mystical character also, and appear to have been framed to confuse the jury instead of to instruct them. We find no error in the causes assigned.

Judgment is therefore affirmed.

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Argument for Appellant.

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(September 14, 1881.)

GRETE v. KNOTT.

(September 14, 1881.)

**RECORD ON APPEAL—JUDGMENT-ROLL—TRANSCRIPT—STIPULATION.—**

Upon appeal from a judgment upon the judgment-roll alone a written stipulation signed by both parties stipulating for judgment in behalf of plaintiff in a certain sum is properly no part of the judgment-roll, and would, on motion, be stricken out, yet where such stipulation is in the record without objection, and is referred to by both parties in argument upon hearing the appeal, it will be considered by the court as a part of the transcript by consent of parties.

**JUDGMENT ON STIPULATION—PRACTICE.—**Where a defendant stipulates that judgment may be entered for plaintiff for a sum greater than that demanded in the complaint a judgment for such sum is proper.

**APPEAL** from District Court, Alturas County. **Affirmed.**

Edward Nugent, for Appellant.

The defendant was not within the jurisdiction of the court; it then becomes the duty of the respondent to show that personal jurisdiction was acquired at the time the judgment was rendered. If this is done by publication, it must appear that all the requirements of the statute were strictly complied with. (*Galpin v. Page*, 18 Wall. 350; S. C., 3 Saw. 103, Fed. Cas. No. 5206; *Neff v. Pennoyer*, 3 Saw. 295, Fed. Cas. No. 10,085; *Pennoyer v. Neff*, 95 U. S. 714; *Webster v. Reid*, 11 How. 437; Freeman on Judgments, 3d ed., secs. 125, 127; *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Belcher v. Chambers*, 53 Cal. 635; *Brady v. Seaman*, 30 Cal. 618; *Jordan v. Giblin*, 12 Cal. 101; *Ricketson v. Richardson*, 26 Cal. 155; *McMinn v. Whelan*, 27 Cal. 314; *Gray v. Larrimore*, 4 Saw. 644, Fed. Cas. No. 5721.) The paper appearing in the transcript indorsed "Stipulation for Judgment" is merely an agreement concerning one of the thirteen causes of action set forth in the complaint, and is treated as such by both the plaintiff and the court, since the judgment is on default, and the right to render it based on the service by publication. The statute provides that the sole evidence of an appearance shall be an answer, demurrer, or written notice of an appearance. A court cannot change this

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Argument for Respondent.

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requirement of the statute. (*Steinbach v. Lees*, 27 Cal. 298; *Glidden v. Packard*, 28 Cal. 651.) There is nothing in the record to show that the defendant signed the stipulation in question, proof of which should appear and should be in the judgment-roll if the court is to take judicial notice of it. (*Joyce v. Joyce*, 5 Cal. 449; *Litchfield v. Burwell*, 5 How. Pr. 341.)

Richard Z. Johnson, for Respondent.

The first three specifications of error do not arise upon the record as presented upon this appeal. (*Wetherbee v. Carroll*, 33 Cal. 553; *Sharp v. Daugney*, 33 Cal. 506, 514; *Morris v. Angel*, 42 Cal. 240; *Harper v. Minor*, 27 Cal. 109; *Abbott v. Douglass*, 28 Cal. 296.) It may be admitted that a judgment without jurisdiction is void, and for the purposes of this appeal, that a defendant may show a want of jurisdiction whenever and wherever he is confronted with a judgment, but no such showing is made in this case, and in its absence the court will not presume error and contradict the record. Every act of a court of competent jurisdiction is presumed to have been rightly done, and every matter adjudicated becomes a part of the record. (*Voorhees v. Bank of United States*, 10 Pet. 470; *Galpin v. Page*, 18 Wall. 365.) In this case there was no adjudication or recital of service. (*Lick v. Stockdale*, 18 Cal. 223, 224; *Quivey v. Porter*, 37 Cal. 463, 464; *Reily v. Lancaster*, 39 Cal. 355, 356; *Eitel v. Foote*, 39 Cal. 441; *Sharp v. Brunnings*, 35 Cal. 533, 534; *Hahn v. Kelley*, 34 Cal. 407, 408, 419, 420, 426, 428; *Vassault v. Austin*, 36 Cal. 695, 696; *McCauley v. Fulton*, 44 Cal. 361.) A judgment does not depend upon the clerical duty of making up the judgment-roll or preserving the papers. (Freeman on Judgments, sec. 87; *Lick v. Stockdale*, 18 Cal. 219, 223; *Sharp v. Lumley*, 34 Cal. 612, 614.) The judgment was by consent and no appeal will lie therefrom; it was ordered entered in accord with the prayer of the complaint and a stipulation on file. (*Spinetti v. Brignardello*, 53 Cal. 283.) A judgment entered upon stipulation will not be reviewed. (*Mecham v. McKay*, 37 Cal. 158; *Thompson v. Connolly*, 43 Cal. 636; *Meerholz v. Sessions*, 9 Cal. 277; *Brotherton v. Hart*, 11 Cal. 405; *Coryell v. Cain*, 16 Cal. 572; *Sleeper v. Kelly*, 22 Cal. 456; *Imley v. Beard*, 6 Cal. 666.) Stipulations in actions pending filed or entered of record are solemn agreements be-

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tween the parties and with the court, and courts are bound to enforce them. (*Meagher v. Gagliardo*, 35 Cal. 605, 606; *Banks v. American Tract Society*, 4 Sand. 438; *Staples v. Parker*, 41 Barb. 648; *Oakley v. Aspinwall*, 2 Sand. 7.)

BUCK, J.—The plaintiff filed his complaint in this action on the third day of October, 1879. Summons was issued on the same day, but personal service was never effected. An attempt at service was made by publication on the twenty-seventh day of April, 1880. The following stipulation was entered of record in the case and filed:

*"In the District Court of the Second Judicial District, in and for Idaho Territory, Owyhee County.*

"JOHN GRETE  
v.  
WM. B. KNOTT. }

"It is stipulated by and between the parties hereto that in the item of the complaint containing the account of Timothy Warren against the defendant, be enlarged to the amount of \$677, on account of a failure of certain credits allowed in the complaint, and that the whole judgment be enlarged to embrace said sum.

WM. B. KNOTT.

"April 27, 1880."

On the same day judgment was entered in compliance with the prayer of the complaint and that stipulation on file for \$4,291.89 and costs and disbursements. The said stipulation was the only appearance of the defendant in the case. The case comes to this court on an appeal from the judgment, and the record consists of the judgment-roll alone. The appeal seeks to reverse the judgment on the following grounds: 1. Because the record shows that the defendant was a nonresident, and does not show sufficient service of the summons to give the court jurisdiction of the person of defendant; 2. That there was no waiver of service of the summons; 3. That the paper appearing in the transcript marked "Stipulation for Judgment" was not an appearance on the part of the defendant; 4. That the record does not show that said stipulation was signed by defendant, and that proof of such signature should appear in the judgment-roll.

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Opinion of the Court—Buck, J.

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In the argument of the case the attention of the respective attorneys was given chiefly to two points: 1. Whether the service of the summons, as shown by the record, was sufficient to give the court jurisdiction; 2. Whether the paper indorsed "stipulation" was sufficient to sustain the judgment.

The first point is a question of great importance, involving the validity of service of summons by publication, much discussed in later decisions in federal and state courts.

The judgment of the court, however, is based in this case on the stipulation for judgment, and it is not, therefore, necessary to consider the first point. The paper marked "Stipulation for Judgment" properly forms no part of the judgment-roll, and under former decisions of this court would have been stricken out on motion, had such a motion been made. But as it is made a part of the transcript, and no objection being made to it, and the attorneys of the respective parties having given prominence to it in the argument, the court is of the opinion that it should be considered as a part of the record by consent of parties. This paper is entitled and filed as other papers in the action. Appellant claims that it has reference to but one specified item in the complaint. But in direct terms it refers to the whole judgment. In terms, it stipulates that that item be enlarged to \$600, and that the whole judgment be enlarged to include that amount. The whole judgment, by reasonable construction, is the judgment asked for in the complaint. The court is of the opinion that this writing, in terms, consents, at least, that the judgment entered according to the prayer of the complaint be enlarged by \$600. If advantage was taken of defendant in entering judgment too soon, or contrary to the terms of the stipulation, the defendant might have had it corrected in the court below under section 68 of the Code of Civil Procedure. The judgment recites that it was entered according to the prayer of the complaint and the stipulation on file. Even without reference to the terms of the stipulation, from the terms of the judgment we presume that the truth of the recitals was established by competent evidence to the satisfaction of the court, but the evidence should form no part of the judgment-roll.

The judgment is affirmed.

Morgan, C. J., and Prickett, J., concurred.



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Opinion of the Court—Prickett, J.

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(September 13, 1882.)

## PEOPLE v. MOONEY.

[2 Pac. 876.]

**HOMICIDE UNDER STATUTE—DEGREE OF CRIME—INSTRUCTIONS.—**

Upon a trial for murder an instruction to the effect that the defendant is guilty of murder in the first degree if the jury believe from the evidence, beyond a reasonable doubt, that the deceased was killed by defendant while defendant was attempting to commit a robbery, is correct under a statute which makes such offense murder in the first degree.

**APPEAL—RECORD ON APPEAL—PRESUMPTIONS—INSTRUCTIONS.—**Upon an appeal from a judgment of conviction in a criminal case, in the absence of the evidence, the instructions will be presumed correct, if, under any possible state of the evidence, the instruction was authorized.

**APPEAL** from District Court, Oneida County. Affirmed.

H. M. Bennett, for Appellant.

W. A. Crawford, District Attorney, for the People.

No briefs were filed in this case.

**PRICKETT, J.**—At the November term of the district court of the third judicial district, held in and for the county of Oneida, A. D. 1881, the defendant was indicted for the crime of murder; and, upon a trial, was convicted of murder in the first degree, and thereupon judgment of death was pronounced against him. From that judgment the defendant has appealed to this court, and the case has been submitted upon briefs, without oral argument. There is no evidence or bill of exceptions in the record, nor is there any assignment of errors on file. We are therefore left to an examination of the record, viz., the indictment, the instructions of the district court to the jury, and the judgment; and if there be no error apparent upon their face, the judgment must be affirmed. The indictment seems, upon inspection, to be perfect, and no objection is urged to the judgment, but from the tenor of the appellant's brief we conclude that he objects to the following instruction given by the court to the jury, to wit: "If the jury believe from the evidence, beyond a reasonable doubt, that this defendant killed Joel Hinkley, and

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Opinion of the Court—Prickett, J.

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that such killing was perpetrated while the defendant, either by himself or with another person, was attempting to commit a robbery, then they may find the defendant guilty of murder in the first degree." There being no evidence in the record, upon the familiar principle that he who alleges error must show it, if the instruction was correct under any possible state of the evidence, it must be sustained.

The statutes of this territory (section 21 of the act concerning crimes and punishments) provide that involuntary manslaughter shall consist in the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner, provided that when such involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder. Section 17 of the same act provides that all murder which shall be committed in the perpetration or attempt to perpetrate robbery shall be deemed murder of the first degree.

Thus it will be seen that section 21 makes the unintentional killing of a human being committed in the prosecution of a felonious intent, murder, and section 17 makes it murder in the first degree, if the intent was to commit the felony of robbery, and some others therein enumerated. Under the statute, then, the instruction was proper; indeed, the court might have instructed the jury, under the circumstances stated, not only that they might find the defendant guilty of murder in the first degree, but that such was their duty. It is competent for the legislature to prescribe what felonious homicides shall be deemed murder, and to define the degrees. It is the policy of the law to hold persons engaged in felonies, or attempts to commit felonies, responsible for all the consequences of their felonious acts, whether such consequences were definitely intended or not; the intent to commit a felony standing in the place of the malice in ordinary cases of murder. It follows that the instruction given being correct in law, those asked by the defendant's counsel, upon the view that the killing, in order to constitute murder, must have been intentional, were incorrect, and were properly refused.

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Opinion of the Court—Morgan, C. J.

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There being no error either in the giving or refusal to give instructions, the judgment of the court below must be affirmed, and it is accordingly hereby affirmed.

The cause is remanded to the district court, with directions to fix anew the time for executing its judgment.

Morgan, C. J., and Buck, J., concurring.

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(September 11, 1882.)

RUPERT v. BOARD OF COMMISSIONERS OF ALTURAS COUNTY.

[2 Pac. 718.]

**APPEAL—STATUTORY RIGHT.**—The right to appeal, and the manner of perfecting it, is wholly dependent upon our territorial statutes.

**APPEALABLE JUDGMENT—ORDER OF BOARD OF COUNTY COMMISSIONERS.**—No appeal will lie from the judgment of the district court upon an appeal to the district court from an order made by the board of county commissioners determining the result of an election.

**SAME—WRIT OF ERROR.**—In such case the remedy is not by appeal but by writ of error; and, aided by bills of exceptions, writs of error furnish a complete and perfect means of bringing causes from an inferior court to the appellate court for review, and for the correction of errors.

**APPEAL** from District Court, Alturas County. The judgment appealed from being nonappealable, the appeal is dismissed.

J. Brumback, for Appellants.

R. Z. Johnson and Huston & Gray, for Respondent.

No briefs were filed in this case.

**MORGAN, C. J.**—In the matter of the motion to dismiss the appeal taken by the board of county commissioners of Alturas county, Idaho territory, from the judgment of the district court of the second judicial district in and for said county of Alturas, entered in the records of said court on the third day of November, 1881. It appears from the record in this cause that

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pursuant to law an election was held in Alturas county, for the relocation of the county seat thereof, on the twelfth day of September, A. D. 1881; that on the twenty-second day of September, A. D. 1881, the said board of county commissioners canvassed the votes cast at said election, and duly entered the result thereof in their records on said last-mentioned date; that on the first day of October, A. D. 1881, one Joseph A. Rupert, of said county, took an appeal from the order of said board declaring the result of said canvass to the district court in and for said county; that after hearing said cause final judgment was entered therein, as stated, on the third day of November, 1881. From said judgment the said board of county commissioners attempted to take an appeal to this court under and by virtue of sections 641 and 642 of the 11th Session Laws of Idaho. The question is can this cause be brought to this court by this method? At common law appeals of this character are unknown. (See Powell's Appellate Proceedings, p. 104, sec. 6; *Wiscart v. Dauchy*, 3 Dall. 321; Curtis' American Conveyancer, sec. 185.) The right to appeal, therefore, and the method of perfecting it is wholly dependent upon the statutes in force in this territory. (See, also, *United States v. Gilson*, 1 Idaho, 364.) Section 1869 of the organic act of this territory states that "writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court of all the territories, respectively, under such regulations as may be prescribed by law; that is, such regulations as may be prescribed by the laws of the territory." Section 642 of the 11th Session Laws of Idaho distinctly and clearly sets forth what class of cases may be brought to this court by appeal, as follows: An appeal may be taken to the supreme court from a district court (1) from a final judgment in an action or special proceeding commenced in the court in which the same is rendered; (2) from a judgment rendered on an appeal from an inferior court; (3) from an order granting or refusing to grant a new trial, and from various other orders mentioned in said third clause.

Clearly, it is not the duty of this court to give the words of a statute any other meaning than is expressed by their legal signification. It is not the duty of this court, nor has it the

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Opinion of the Court—Morgan, C. J.

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authority, to give a statute any broader scope than that intended by the legislature. Does this case come within the first clause of said section? Was this an action or special proceeding commenced in the district court? By virtue of section 28, page 690, of the Revised Laws of Idaho, it became the duty of the said board of county commissioners to canvass the votes cast at said election, and declare the result, which they did. From the order declaring this result the first clause of section 25, county commissioners' law (Idaho Revised Laws, 529), gives the right of appeal to the district court. Section 26 gives the method of appeal. Section 28 directs the clerk of the board of county commissioners as to his duties upon receiving the notice of appeal and undertaking. Section 27 authorizes and directs the district court to hear the case anew, and empowers said court to affirm, reverse, annul, or modify the order of the board.

The appeal of the respondent in this court was taken from the order of the board in accordance with the sections above set forth, and the cause was heard in the district court on said appeal. We think it must be held that said action was commenced when the notice of appeal was filed with the clerk of the board of county commissioners; that the order of the board of county commissioners is a constituent and necessary part of this cause, and the foundation of the action. All the proceedings until the appeal was perfected were had before the board of county commissioners, or with the clerk of said board. An appeal from the order of the board of commissioners necessitates such an order by the board as a priority to the appeal and the foundation thereof. In an action or special proceeding commenced in the district court it will be found that the papers which commenced the action are always placed on file in said district court with the clerk thereof; and it is never an appeal from a judgment, order, or decision of any other court, tribunal, or board whatever. The ordinary and legal signification of the word "appeal" indicates that there has been an order, judgment, or decision by some inferior board or tribunal. We think it must be held that this cause or proceeding was commenced before the board of county commissioners, and therefore does not come under the first clause of section 642. The second clause of said section allows appeals from the judgments rendered by inferior

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Points decided.

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courts. A court is a body in the government to which the public administration of justice is delegated. The one common and essential feature in all courts is a judge or judges having some sort of judicial functions, power, or authority. (Bouvier's Law Dictionary, 373 et seq.) Section 1907 of the Revised Statutes of the United States specifies in what bodies or persons judicial power is vested in the territories, namely: In supreme court, district courts, probate courts, and in justices of the peace. Boards of county commissioners are not among the number, and have no judicial functions or power, and cannot be vested therewith; therefore they are not courts. This clause is clearly not within the third clause of section 642.

Parties deeming themselves aggrieved by the judgment of the district court are not without a complete remedy. Writs of error, aided by bills of exceptions, have for six centuries, under the common law, furnished a complete and perfect means of bringing causes from an inferior court to the appellate court for review, and for the correction of errors, if any there be. All the virtues of this ancient and complete remedy are at the service of the people of this territory.

We think this appeal, not being allowed by the statute, should be dismissed; and it is dismissed.

Prickett and Buck, JJ., concurred.

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(September 13, 1882.)

UNITED STATES v. HAILEY.

[3 Pac. 263.]

**ADMINISTRATOR—PRESENTMENT OF CLAIM TO—REVIVAL OF ACTION AGAINST PERSONAL REPRESENTATIVE.**—Under section 140, page 267, Revised Laws of Idaho, which provides that, "if any action be pending against the testator or intestate at the time of his death, the plaintiff shall . . . present his claim to the executor or administrator for allowance or rejection, authenticated, as in other cases, and no recovery shall be had in the action unless proof be made of the presentation required by the law," an action by the United States which has been revived against the decedent's administrator without presentation of plaintiff's claim as required by statute will be dismissed, as such statute applies to the United States.

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Argument for Appellant.

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APPEAL from District Court, Ada County. Affirmed.

Wallace R. White, United States District Attorney, for Appellant.

The court below, on motion, instructed the jury to find for the defendant, on the ground that the claim of appellant had not been presented to the administrator in the manner provided by law. The motion should have been denied. No laches can be imputed to the public. (1 Blackstone's Commentaries, Cooley's ed. 247; *Troutman v. May*, 33 Pa. St. 455; *People v. Gilbert*, 18 Johns. 227; *Wallace v. Miner*, 6 Ohio, 367; *Munshower v. Patton*, 10 Serg. & R. 334, 13 Am. Dec. 678; *Bagley v. Wallace*, 16 Serg. & R. 245; *Stoughton v. Baker*, 4 Mass. 528, 3 Am. Dec. 236; Angell on Limitations, secs. 34-40.) A statute cannot divest the public of any rights unless specially named therein. (8 Bacon's Abridgment, 92, "E"-5; *United States v. Herron*, 20 Wall. 251; *United States v. Knight*, 14 Pet. 315.) No claim of the United States is barred by statute of limitations unless expressly named in the United States statute laws. (*United States v. Thompson*, 98 U. S. 487; *McKeehan v. Commonwealth*, 3 Pa. St. 151; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *United States v. Herron*, 20 Wall. 251; Angell on Limitations, secs. 34-40.) The law prescribing the time a claim must be filed against decedent estates is a statute of limitation. (*Wren v. Splann*, 1 How. (Miss.) 15; *Parmilee v. McNutt*, 9 Miss. (1 Smedes & M.) 179; *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373.) If the United States are not bound by section 131 of the Revised Statutes of Idaho, they are not bound by section 140 of the same. The time prescribed within which a claim must be presented against a decedent estate does not apply to a state or the United States. (*Parmilee v. McNutt*, 9 Miss. (1 Smedes & M.) 179; *United States v. Williams*, 5 McLean, 133, Fed. Cas. No. 16,721; *Gausson v. United States*, 97 U. S. 585; *Booth v. United States*, 11 Gill & J. 373; *United States v. Backus*, 6 McLean, 443, Fed. Cas. No. 14,491.) The United States statutes, section 955, has been complied with in this case by the voluntary appearance of defendant Hailey. (*Wilson v. Codman*, 3 Cranch, 193.) Claims of the United States against estates of deceased persons are not governed by

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Opinion of the Court—Morgan, C. J.

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probate laws. (*United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *United States v. Backus*, 6 McLean, 433, Fed. Cas. No. 14,491.)

R. Z. Johnson and Huston & Gray, for Respondent.

As no proof of the presentation of the claim in this suit to the administrator was made in the court below, it was proper to direct a verdict for the defendant. (Probate Practice Act, secs. 138, 140; Revised Laws of Idaho, 267; Cal. Code Civ. Proc., secs. 1500, 1502. *Bank of Stockton v. Howland*, 42 Cal. 132; *Coleman v. Woodworth*, 28 Cal. 568, 569.) It is only claims duly presented and allowed which the administrator is authorized to pay. (*Harp v. Calahan*, 46 Cal. 232; *Pitte v. Shipley*, 46 Cal. 161.) The foregoing provisions of our Probate Practice Act are applicable to this action. (*United States v. Egglestone*, 4 Saw. C. C. 201, 202, 203, 204, Fed. Cas. No. 15,027.) Territorial courts are not courts of the United States, within the meaning of the constitution. (*Clinton v. Englebrecht*, 13 Wall. 434; *Hornbuckle v. Toombs*, 18 Wall. 648.) An administrator is bound to account for all assets received by virtue of his administration to the court from which he receives his authority. (*Vaughan v. Northup*, 15 Pet. 6; *Yonley v. Lavender*, 21 Wall. 279, 280, 284.) The effect of a judgment of a court of the United States against an administrator is determined by the probate law under which he is acting. (*Peale v. Phipps*, 4 How. 375; *Williams v. Benedict*, 8 How. 111.) The United States must come into court to enforce its rights the same as any other suitor. (*Mitchel v. United States*, 9 Pet. 743; 2 Co. Inst. 573; 2 Ves. Sr. 297; *Hard*, 60, 460; *Brent v. Bank*, 10 Pet. 614.)

MORGAN, C. J.—In this case suit was brought January 24, 1877, by the United States upon the bond of Virgil S. Eggleston, upon which A. H. Robie was surety. The defendant A. H. Robie died some time previous to the November term of the district court for Ada county, 1878. At said term, at the suggestion of his death by attorneys for both parties, his administrator, John Hailey, was made a party to the suit, and appeared therein by his counsel. On the tenth day of December,



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Opinion of the Court—Morgan, C. J.

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1881, the cause came on for trial before the court and jury. The plaintiff having completed its evidence and rested, the defendant moved the court to direct the jury to find a verdict for the defendant on the ground that the evidence does not show that the claim in suit has been presented to the administrator for allowance or rejection. The motion was allowed by the court, and the jury, under the instructions of the court, rendered a verdict for the defendant.

The case was brought by appeal to this court. The only question in this case is as to whether section 140, page 267, of the Revised Laws of Idaho, binds the United States the same as any other litigant. The claim never having been presented to the administrator, the matter as to limitation of time does not come in question. For the same reason there is no question of laches on the part of the plaintiff; therefore, section 131, page 265, has no bearing on the question at issue. Section 955 of the Revised Laws of United States, cited by counsel, directs in what manner administrators may become parties in the United States courts; the district court of the territory not being such a court, it does not apply. (*United States v. Mays*, 1 Idaho, 763; *Clinton v. Englebrecht*, 13 Wall. 434; *Hornbuckle v. Toombs*, 18 Wall. 648.) Nor is there any question in this case as to the appearance of the administrator, he having voluntarily appeared both in person and by attorney. Section 140 of the Revised Laws, before quoted, states: "If any action be pending against the testator or intestate at the time of his death, the plaintiff shall in like manner present his claim to the executor or administrator for allowance or rejection, authenticated, as in other cases, and no recovery shall be had in the action unless proof be made of the presentation required by law." In cases in the United States courts the practice in all cases is regulated by the laws in force in the states or territories wherein such suit is pending. (*United States v. Mays*, *supra*; *Clinton v. Englebrecht*, *supra*; *Hornbuckle v. Toombs*, *supra*; *Reynolds v. United States*, 98 U. S. 154; *United States v. Eggleston*, 4 Saw. 201, et seq., Fed. Cas. No. 15,027; *McGill v. Armour*, 11 How. 142.) The administrator is exclusively bound to account for all the assets which he receives, under and by virtue of his administration, to the court from which he derives

## Argument for Appellant.

his authority. (*Vaughan v. Northup*, 15 Pet. 6; *Yonly v. Lavender*, 21 Wall. 279, et seq.) When the United States is compelled to come into court to enforce its rights it must come in as any other suitor. (*Mitchel v. United States*, 9 Pet. 743.) And the proceedings in such action must be in accordance with local laws in force at the time in the state or territory where the suit is commenced. In this case the probate laws in this territory must govern and determine the method of procedure to obtain judgment. (*Peale v. Phipps*, 4 How. 375; *Williams v. Benedict*, 8 How. 111; *Bank v. Horn*, 17 How. 157; *Pulliam v. Osborne*, 17 How. 475, 476.) A right of priority of payment on the part of the United States is not involved in this cause, and, if it was, the right of the United States to priority given by law is recognized by section 239 of the Probate Act, Revised Laws of Idaho.

Judgment of the court below must therefore be affirmed.

Buck, J., having been of counsel for appellant in the court below, did not sit in the hearing of this case.

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(September 13, 1882.)

SALMON RIVER MINING AND SMELTING COMPANY  
v. DUNN.

[3 Pac. 911.]

**ULTRA VIRES—CORPORATE POWERS.**—A corporation, as a general rule, can only exercise such powers as are specifically granted by the act of incorporation, or such as are necessary for the exercise of such powers, all other acts being *ultra vires*.

**SAME.**—A corporation whose charter authorizes it to engage in the business of mining and smelting is not authorized to purchase choses in action, as such act is not necessary to the business of mining and smelting.

APPEAL from District Court, Custer County. Reversed.

James H. Hawley and J. Brumback, for Appellant.

An act of a corporation that is *ultra vires* is void. (*Currier v. Railroad Co.*, 11 Ohio St. 228; *Commonwealth v. Erie etc. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *St. Louis v. Weber*,

## Opinion of the Court—Prickett, J.

44 Mo. 547; *Wheeler v. Board*, 39 N. J. L. 291; *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291; *Darst v. Gale*, 83 Ill. 136.)

Thomas J. Galbraith, for Respondent.

A contest with a person, natural or artificial, under disability who becomes liable to pay money to such person, will not be permitted to avail himself of such disability to avoid his obligation. (*Steam Nav. Co. v. Weed*, 17 Barb. 378, cited in Green's Brice's Ultra Vires, 619; *Smith v. Sheely*, 12 Wall. 358; *Barry v. Merc. Ex. Co.*, 1 Sand. 280; *Reynolds v. Commissioners of Stark Co.*, 5 Ohio, 205; *Gaines v. Bank of Mississippi*, 12 Ark. 769; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706; *John v. Farmers' etc. Bank*, 2 Blackf. 367, 20 Am. Dec. 119; *Mitchell v. Deeds*, 1 Am. Corp. Cas. 460; *Ramsey v. Peoria etc. Ins. Co.*, 3 Am. Corp. Cas. 271; *Gill v. Kentucky etc. Co.*, 3 Am. Corp. Cas. 346; *Pittsburg etc. R. R. Co. v. County of Alleghany*, 4 Am. Corp. Cas. 92; *Wood Hyd. Hose Co. v. King*, 4 Am. Corp. Cas. 344; *Littlewort v. Davis*, 5 Am. Corp. Cas. 493; *Touchard v. Touchard*, 5 Cal. 306; *Mokelumne Hill etc. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658; *Natoma Water etc. Co. v. Clarkin*, 14 Cal. 544; *California etc. Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398; *Spring Valley W. W. v. San Francisco*, 22 Cal. 434; *Union W. Co. v. Murphy's Flat F. Co.*, 22 Cal. 620; *Danneburg G. Q. M. Co. v. Allment*, 26 Cal. 286; *People v. Frank*, 28 Cal. 507; *Rondell v. Fay*, 32 Cal. 354; *Oroville etc. R. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354; *Pacific Bank v. De Ro*, 37 Cal. 538; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 30; *Vandall v. South San Francisco Dock Co.*, 40 Cal. 83; *Dean v. Davis*, 51 Cal. 406; *McKiernan v. Lenzen*, 56 Cal. 62; *Boise City C. Co. v. Pinkham*, 1 Idaho, 790; *United States v. Amedy*, 11 Wheat. 392.)

PRICKETT, J.—This action was commenced in the district court of the third judicial district, in and for Lemhi county, and afterward transferred to Custer county, in the same district, for trial. The complaint alleges that the plaintiff is a corporation organized and existing under the laws of the state of Nebraska for the purpose of mining, smelting, and refining

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Opinion of the Court—Prickett, J.

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and marketing the products thereof, and the sale of, and otherwise operating in, mining properties, and, as such, has been, for more than four months last past, doing business in its corporate name. It is further alleged in the complaint that the appellant, Ballard S. Dunn, and one Carson, on the twenty-third day of July, 1880, entered into a contract, by the terms of which Carson was to build a bridge across Salmon river, and to receive therefor, from appellant, the sum of \$3,100; that subsequently to the making of said contract the location of the bridge was changed and the length of the bridge was by such change necessarily increased; and that in consequence of such increased length it was agreed that \$650 should be added to the original contract price; that Carson built the bridge and performed all the conditions of the contract on his part, and on the seventh day of October, 1880, assigned all his right, title, and interest in said contract to the plaintiff; that no part of the money due upon the contract has been paid by the defendant; that defendant has taken and holds possession of the bridge.

The only question before the court is whether the complaint contains facts sufficient to constitute a cause of action; for, notwithstanding the fact that the transcript contains a paper called a bill of exceptions, it is not such in any sense of the term. It is merely an assignment of errors, without any record of bill of exceptions showing the proceedings or decisions of the court in respect to the matters assigned as errors. The general rule is that a corporation has and may exercise such powers as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted, and not as having any other. The plaintiff in this case, as the complainant states, is a corporation organized for the purpose of mining, smelting, refining, and operating in mining properties. The purchasing of choses in action is entirely foreign to this business. In every contract there must be mutuality, and therefore parties capable of contracting. The demurrer to the complaint should have been sustained.

The judgment of the district court is reversed, and the cause remanded, with directions to allow the plaintiff to amend his complaint.

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Argument for Defendant in Error.

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(January 25, 1884.)

VAN CAMP v. BOARD OF COMMISSIONERS OF CUSTER COUNTY.

[2 Pac. 721.]

**APPEALABLE ORDERS.**—An appeal will not lie from a judgment of the district court, in common-law actions or proceedings, unless it is expressly allowed by statute.

**WRIT OF ERROR—PARTIES ARE PRIVIES.**—No one can sue out and maintain a writ of error unless he is a party or privy to the record, or is prejudiced by the judgment.

**APPEAL—CONTINUATION OF CASE—CHANGE OF COURT.**—An appeal is not the commencement of a new action or proceeding, but a continuation of the same case, action or proceeding, being only transferred from one court or tribunal or body to another, for final trial and judgment.

**TITLE OF ACTION—INTERESTED PARTIES.**—Courts will look beyond the mere title of an action or proceeding for the purpose of determining who are interested and affected as parties.

(Syllabus by the court.)

Original proceeding. Motion to dismiss appeal and writ of error.

James H. Hawley, M. Kirkpatrick and E. P. Johnson, for Plaintiff in Error.

No brief on file.

Thomas J. Galbraith and Huston & Gray, for Defendant in Error.

The right of appeal is clearly given by sections 25 to 28, inclusive, page 529, Compiled Laws of Idaho. (*Rupert v. Board of Commissioners of Alturas County*, 2 Idaho (West Pub. Co. ed.), 21, 2 Pac. 718; *Waitz v. Ormsby County*, 1 Nev. 370.) Van Camp, defendant in error, was a proper party to take the appeal from the order of board of commissioners. (Idaho Comp. Laws, sec. 25, p. 529; *Rupert v. Board of Commrs.*, 2 Idaho (West Pub. Co. ed.), 21, 2 Pac. 718; 1 Pomeroy's Equity Jurisprudence, 259, 360; 2 High on Injunctions, 853; 2 Dillon on Municipal Corporations, 914 et seq.; *Newmeyer v. Missouri etc. R. R. Co.*, 52 Mo. 81, 14 Am. Rep. 394, and note on page 700; Cooley on Taxation, 548; *Foster v. Coleman*, 10 Cal. 278.)

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Opinion of the Court—Prickett, J.

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PRICKETT, J.—It appears from the transcript in this cause that the assessor of Custer county assessed the property of the General Custer Mining Company for the year 1881 as follows: Its mill and appurtenances at \$70,000, and bullion produced by them and in their possession, \$170,000; that at the regular meeting of the board of equalization of that county, held in August, 1881, the superintendent of the company appeared, and complained that such assessment was too high, and asked a reduction; that, upon such complaint, the board reduced the assessment and valuation of the mill and appurtenances to \$35,000, and of the bullion to \$25,000; that from such order James H. Van Camp, a citizen and taxpayer of the county, appealed to the district court of the third judicial district, held in and for Custer county; that the notice of such appeal was addressed and directed to the board of commissioners of Custer county and the General Custer Mining Company, and was served by mail upon the superintendent of the company; that the commissioners appeared by counsel in the district and moved to dismiss the appeal, on the ground that no appeal lies from the order of the board of equalization, and that, if it does lie in this case, that James H. Van Camp is not authorized or qualified by law to take such appeal, which motion was denied by the court. Such proceedings were afterward had in the district court as resulted in a judgment, rendered June 17, 1882, modifying the decision of the board of commissioners, and fixing the value of the mill and appurtenances at \$35,000 (as previously ordered by them), and of the bullion at \$170,000, and requiring the board of commissioners, the county auditor, and the assessor and collector of taxes to proceed, and to adjust and collect the proper taxes upon such valuation, in manner and form, now for then, as if the appeal to the district court had not been taken. It was further ordered that a copy of the judgment be served upon the board of commissioners, the county auditor, the assessor, and tax collector of the county, and upon the General Custer Mining Company or its attorney.

On the fourteenth day of September, 1882, the General Custer Mining Company filed in the office of the clerk of the district court, and served, a notice of appeal from said judgment to this court, and on the next day gave an undertaking on said

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Opinion of the Court—Prickett, J.

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appeal, and on the sixteenth day of November, 1883, the said company sued out, and caused to be issued from this court, a writ of error to said district court. The respondent in this appeal and the defendant in error, James H. Van Camp, now moves to dismiss both the appeal and the writ of error—the former on the ground that no appeal is allowed by law in the cause, and the latter because the General Custer Mining Company is not a party to the record or judgment in the district court; that it does not appear from the record that the commissioners of Custer county authorized or consented to the suing out of the writ; that it does not appear from the writ of error herein that the board of commissioners or the General Custer Mining Company are injured or prejudiced by the judgment of the district court; that the said company has no standing in this court, because it does not appear by the record that it has paid or tendered the tax on its property upon the valuation thereof as fixed by the board of commissioners; and on the further ground that there is no statement of the case or bill of exceptions in the transcript in support of the writ of error. At the last term of this court, in the case of *Rupert v. Board of Commissioners, etc.*, ante, p. 19, 2 Pac. 718, it was decided that no appeal would lie to this court from a judgment of the district court rendered upon an appeal from an order of a board of county commissioners, because such cases, although somewhat anomalous in character do not partake of the nature of suits in chancery, which can be transferred from one court to another in that manner, but were proceedings at law, which, in the absence of any statute conferring the right of appeal, were to be reviewed by writ of error, and that there is no statute of this territory authorizing or providing for an appeal to this court in such cases. That decision was rendered on the eleventh day of September, 1882, about the time the notice of appeal was filed in the district court from its judgment in this case; from which fact, and the subsequent suing out of the writ of error, it is reasonable to presume that the General Custer Mining Company abandoned its appeal, and concluded to rely upon its writ of error instead. Indeed, the appeal is not now insisted upon by counsel for the appellant. Upon the authority of the case above referred to the appeal is dismissed.

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Opinion of the Court—Prickett, J.

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The objections made by the moving party to the writ of error, and to the right of the plaintiff in error to be heard thereon, will now be considered and briefly discussed; and 1. Is the General Custer Mining Company such a party to the record, proceedings, and judgment of the district court as is entitled to a writ of error to review the same? The rule concerning writs of error at common law (and we have not now any statute extending or changing that rule) unquestionably is that no one can bring error unless he is a party or privy to the record, or is prejudiced by the judgment, and the rule seems to be inflexible (Bacon's Abridgment "Error"; *Connor v. Peugh*, 18 How. 394); and, as proceedings in error are in the nature of new actions, this rule probably had its origin in the same general principle that governs in relation to the parties in personal actions, that the action must be brought in the name of the party whose legal right has been affected.

The origin and foundation of the proceedings in this cause was the complaint made by the General Custer Mining Company, through its superintendent and agent, to the board of equalization, that its property was assessed too high. In that initiatory proceeding or step the company stood in the relation of complainant or plaintiff. Upon such complaint, and the hearing had thereunder, they procured an order favorable to their interest—a reduction in the assessment, and a consequent reduction in the amount of taxes to be paid. To the order and decision of the board they had a vested right, subject only to a reversal or modification, by competent authority, in the mode prescribed by law; and although the proceedings before the board neither had or were required to have a name or title, the General Custer Mining Company were unquestionably interested in such proceedings, and in the order obtained therein. The statute (Revised Laws, p. 529, sec. 25) authorizes appeals to be taken from orders of the board of county commissioners to the district court, and the appeal in this case was taken under that statute; but an appeal, strictly speaking, is not the commencement of a new action or proceeding, but a continuation of the same case, action, or proceeding, being only a transfer from one court, tribunal, or body to another for final trial and judgment. Hence, the policy and propriety of the statute, which requires



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Opinion of the Court—Prickett, J.

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the notice of appeal in such cases to be served on "any person having a beneficial interest in the order or decision appealed from," in order that they may have an opportunity to defend their claim, and maintain the advantages of the order, if they are able to do so. They are still parties to the proceeding, and continue so to be until their rights in the matter are finally adjudicated, whether they appear in the appellate tribunal or not.

Much stress was laid in the argument upon the fact that the name of the General Custer Mining Company does not appear in the title of the original notice of appeals or other papers, or in the judgment of the district court; and it is urged that therefore they are not a party to the record or judgment. The papers, proceeding, and judgment are, it is true, entitled "*J. H. Van Camp v. Board of County Commissioners of Custer County*," but the plaintiff in error is not responsible for that name or title, nor do I know of any law requiring the papers, proceeding, and judgment to be so entitled. "Van Camp's Appeal" would, perhaps, be the more appropriate title. The title or name by which an action or proceeding is called certainly cannot change its character or divest interests acquired before the christening. They remain the same. It is provided by section 711 of our Code of Procedure that "an affidavit, notice, or other paper without the title to the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding." We think that section applicable to the question under consideration, and even without it that it would be the duty of the court to look beyond the mere title to ascertain who are interested and affected parties. As to the judgment we think it cannot be seriously contended or claimed that the direction and order therein contained, that the several revenue officers of the county proceed and collect the taxes upon the increased valuation of the property, imposes no liability or obligation upon the General Custer Mining Company to pay taxes thereon. As long as laws exist for enforcing the collection of taxes, it must be evident to all that the contrary is the case. We conclude, therefore, upon this question, that the General Custer Mining Company is a party to the record, proceedings, and judgment, and that such judgment was and is preju-

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Points decided.

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dicial to its interests, in the sense that it increased its liability to the public.

There are no pleadings in proceedings of this character in which the fact of payment or tender of the taxes upon the valuation of the property, as fixed by the board, could be alleged, and it is difficult for us to understand how that fact could be made to appear by the record. The bond given as a *superseas* is theoretically and presumptively, at least, sufficient to save the defendant in error and the public harmless from all damages they may suffer by reason of the delay in the payment of the taxes, if they have not been paid. This is not a case in which it is necessary for the record to show payment or tender in order to give the party standing in court. It is not, in the opinion of this court, necessary, to entitle a party to a writ of error, that there should be either bill of exceptions or statement; the object of these is to bring into and make of record what was not so. If errors appear upon the face of the judgment-roll, they can be shown and taken advantage of upon the hearing.

The motion to dismiss the writ of error is denied.

Buck, J., concurred.

Morgan, C. J., did not sit in this case.

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(February 14, 1884.)

GREY, SHERIFF, v. CEDERHOLM.

[3 Pac. 12.]

**JUDGMENT—PROBATE COURT DOCKET.**—Entries in the docket of the probate court that complaint was filed, summons issued and served, demurrer to complaint filed, and the entry of fees for overruling demurrer and entering default, with the following entries: "To entering final judgment, \$1.00; certified copy for roll, \$1.50; docketing judgment, 50 cents; making judgment-roll, 50 cents; sheriff's fees, \$5.00; damages, \$310.00"—do not constitute a judgment for either party, and an appeal from such a judgment to the district court will not lie.

(Syllabus by the court.)

**VOID ENTRY NUNC PRO TUNC.**—Under a statute requiring the entry of a judgment by an inferior court at the close of the trial an entry *nunc pro tunc* of such judgment in an inferior court made

## Opinion of the Court—Morgan, C. J.

long after the trial, and after an appeal to the district court had been taken, is unauthorized.

APPEAL from District Court, Alturas County. Affirmed.

Kingsbury & McGowan, for Appellants.

No brief on file.

Angel & Sullivan, for Respondents.

The only question that can be considered here is, Did the district court err in refusing to hear the case *de novo* upon questions of fact or to hear argument of counsel upon the questions of law raised by the demurrer? Under the provisions of section 666 of the Code of Civil Procedure, a statement must be adopted or settled by the justice or judge, which, with a copy of the docket and all motions filed and the notice of appeal, constitute the papers to be used on the hearing of the appeal before the district court. It is clear from the provisions of above section that none of the pleadings in a case can be considered by the district court unless brought into the record by means of a statement. (*Southern Pac. R. R. Co. v. Superior Court of Kern Co.*, 59 Cal. 471; *People ex rel. Jones v. County Court of El Dorado Co.*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328.)

MORGAN, C. J.—This case was commenced in the probate court of Alturas county, by filing a complaint on the twenty-seventh day of November, A. D. 1882. The next day summons was issued and made returnable December 3, 1882, and was so returned, served on defendants. On the return-day the defendants, by their attorneys, Messrs. Kingsbury & McGowan, appeared specially in said cause, and filed their motion to set aside and quash proceedings for reasons stated therein. This motion was overruled by the probate court. Thereupon a demurrer to plaintiff's complaint was filed by defendants. It does not appear from the transcript of the docket that the said demurrer was either sustained or overruled, the only reference thereto being found in the fee-bill, as follows, to wit:

To filing demurrer by defendant.....25  
To overruling demurrer, entering default for want of answer.50

## Opinion of the Court—Morgan, C. J.

Then follow various entries in the record of fees for swearing witnesses, after which the following entries were made:

Plaintiff introduced in evidence judgment-roll of district court in suit of *Chas. Nelson v. W. E. Milner*:

Bond for release of attachment property.....\$ 25

(Two executions offered in evidence. Defendants' counsel object to the introduction of this documentary evidence as being irrelevant and immaterial. Objection overruled. Excepted to by defendants' counsel.)

To entering final judgment..... 1 00

Certified copy for roll..... 1 50

Docketing judgment..... 50

Making judgment-roll..... 50

Filing judgment-roll... .. 25

\$ 4 00

Sheriff's fees..... 5 00

Damages..... 310 00

\$319 00

There is nothing else in the record indicating any judgment by the probate court, either on the demurrer or on the evidence in the cause. From this supposed judgment, the defendants give notice of an appeal to the district court of Alturas county, on the seventh day of December, A. D. 1882, and file an undertaking on the ninth day of December following. On the fifteenth day of January following the papers were placed on file in the district court. On the eighth day of August, 1883, the district court in and for said Alturas county, upon motion of plaintiffs herein, dismissed said appeal. To said judgment dismissing the appeal, the defendants excepted, and on the third day of October following took an appeal to this court.

The only substantial assignment of error in defendants' bill of exceptions is that the court erred in dismissing the appeal from the probate court. It is evident that the first question to be considered is, Was there any judgment by the probate court in this cause? If there was no judgment then there could be no appeal, and an attempted appeal should be at once dismissed.

## Opinion of the Court—Morgan, C. J.

Section 350 of the Civil Code says: "A judgment is the final determination of the rights of the parties in an action or proceeding." Is there a determination of the rights of either party in this record? The entry of "damages, \$310," is claimed to be a judgment. It has none of the elements of a judgment. It is nowhere stated that it is adjudged, ordered, decreed, or considered that the plaintiff should have or recover of defendants, nor that defendant should have or recover of plaintiff, the sum of \$310, or any other sum. There is no word or words used which indicates an adjudication by the probate judge for or against either party. In this there is no indication whether judgment is given for plaintiff or for defendants, and one can only infer from the fact that the probate judge has charged a fee for "entering default for want of answer" that no answer was filed; and therefore that possibly it was the intention to enter judgment for plaintiff. There is no judgment entered either sustaining or overruling demurrer; no default of defendants entered; and no judgment for either plaintiff or defendants. No execution is authorized for either party, and the pretended judgment does not indicate which party is entitled to execution. (*Wright v. Fletcher*, 12 Vt. 431.)

The following entry: "We, the jury, find in favor of the plaintiff and assess his damages at \$1,493 (and the record showed the entry); whereupon the court entered judgment on the verdict"—was held to be no judgment. (*Faulk v. Kellums*, 54 Ill. 189.)

In *Barrett v. Garragan*, 16 Iowa, 47, referred to by counsel for appellant, the transcript showed proceedings up to and including the trial, after which was written:

Judgment for plaintiff against the defendant for ———, October 24, 1856.

Damages.. .. .	\$84 00
Justice fees... ..	80
Constable fees....	25
Two witnesses.....	25

This was held to be a good judgment. This indicates for whom and against whom judgment was given, time, and amount—a very different judgment from the one at bar.

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Points decided.

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It appears that an attempt was made in the probate court to enter up a formal judgment on the twenty-sixth day of July, A. D. 1883, *nunc pro tunc*. Section 603 of the Civil Code requires, when trial is by the court (probate or justice) judgment must be entered at the close of the trial. Judgment was not so entered. An appeal was taken to the district court on the seventh day of December, 1882. After an appeal is taken to the district court and perfected, the probate judge lost all jurisdiction in the cause, and could do nothing in reference thereto, except by order of the district court. Any action, therefore, taken by the probate court after said appeal was not legally taken, and could not change the condition of the record in the district court. There being no judgment in the probate court there could be no appeal, and the appeal was properly dismissed.

This conclusion having completely disposed of the cause, it is not thought proper to enter into the discussion of matters which do not and cannot affect the judgment of the court.

Judgment affirmed.

Prickett and Buck, JJ., concurred.

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(January 28, 1884.)

WARNER v. TEACHENOR.

[2 Pac. 717.]

**PRACTICE—SERVICE OF PAPERS—STATUTORY CONSTRUCTION.**—Section 685 of our Code of Civil Procedure which provides that service of papers may be made by leaving the same in the office of an attorney in a conspicuous place, etc., is in derogation of the common law, and must be strictly construed.

**PROOF OF SERVICE.**—An affidavit in proof of such service must state that all the conditions of the statute authorizing such service have been substantially complied with or it will be disregarded.

(Syllabus by the court.)

**APPEAL** from District Court, Ada County. Appeal dismissed on motion.

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Opinion of the Court—Buck, J.

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Huston & Gray, for Appellants.

J. Brumback, for Respondent.

No briefs filed in this case.

BUCK, J.—This cause comes into this court on appeals from final judgment, and from an order overruling a motion for a new trial. The respondent appears specially by his attorney, and moves a dismissal of the appeal from the judgment on the ground that more than one year had elapsed from the entry of the judgment until the taking of the appeal, and also from the order overruling the motion for a new trial: 1. For defect in the undertaking; 2. Because the notice of appeal contains simply the surname of plaintiff and respondent, without the Christian name; 3. That the record shows no service of notice of appeal.

The objection that the appeal from the judgment was not taken in time, was not contested by the attorney for the appellant, and the defect in the undertaking having been cured by the filing of a new undertaking under section 657 of our Practice Act, there remains only the objection to the contents, and service of the notice of appeal, to be passed upon.

The proof of service of the notice of appeal is contained in the affidavit of the attorney for defendants and appellants to the effect "that affiant served the notice upon the attorney for respondent and plaintiff by leaving a true copy thereof at his office in Boise City, Ada county, Idaho territory, on the twenty-first of May, 1883." Section 685 of the Code of Civil Procedure provides that service may be made upon an attorney during his absence from his office by leaving the notice with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of 8 in the morning and 6 in the afternoon in a conspicuous place in the office. This section provides for constructive service instead of personal, and being in derogation of the common law, which required personal service, the statute must be strictly construed.

In *Jackson v. Gardner*, 2 Caines, 95, the court say, speaking of an affidavit of service like the one at bar: "The affidavit is

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Points decided.

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defective; it does not state that there was no one in the office. The notice might have been slipped down without any intimation and have remained unobserved. To make such service good it ought to have stated that there was not anyone in the office."

This is still more distinctly declared to be the law in *Doll v. Smith*, 32 Cal. 475, in a case in all respects identical with the one at bar.

It is maintained by the appellants that under section 269 of the Code of Civil Procedure, the defect in proof should be disregarded. But service of notice of appeal is a jurisdictional fact which affects the substantial rights of the parties, and the court is of the opinion that the section referred to does not contemplate the disregarding of a defect in proof of a fact necessary to give the court jurisdiction of the matter in controversy.

As to the contents of the notice itself the court is not prepared to say that it is so defective as not to give the respondent sufficient information as to the judgment appealed from. The determination of the court as to the service of the notice of appeal, however, renders it unnecessary to consider the contents of the notice.

The motion of respondent is sustained, and the appeals are dismissed.

Prickett, J., concurred.

Morgan, C. J., did not sit in this case.

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(February 14, 1884.)

**GENERAL CUSTER MINING COMPANY v. VAN CAMP.**

[3 Pac. 22.]

**STATUTORY APPEAL.**—The right to appeal is statutory, and unknown to the common law; it cannot be extended to cases not within the statute.

**BOARD OF EQUALIZATION—POWERS DISTINCT FROM COMMISSIONERS.**—The board of county commissioners and the board of equalization, although composed of the same persons, are separate and distinct bodies, with different duties and powers.



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Argument for Plaintiff in Error.

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**NONAPPEALABLE ORDERS.**—The right of appeal given by statute from orders of the board of commissioners does not imply the right of appeal from orders of the board of equalization.

(Syllabus by the court.)

**ERROR to the District Court of Custer County.**

James H. Hawley, M. Kirkpatrick and E. P. Johnson, for Plaintiff in Error.

We maintain that the district court erred in overruling the motion of plaintiffs in error to dismiss Van Camp's appeal from the board of equalization, and that said court had no jurisdiction to render its judgment in the case: 1. Because the order of the board of equalization was not appealable. The right to appeal is a statutory right and unknown to common law, and exists in jurisdictions governed by the common law only by authority of the statutes of such jurisdiction, and it cannot be extended to cases not within the statute, even by consent of the parties. The statute in all cases must be strictly pursued as to subject matter, time, parties, mode and manner. (*The Constitution v. Woodworth*, 2 Ill. (1 Scam.) 511; *Edwards v. Vandemack*, 13 Ill. 633; *Street v. Francis*, 3 Ohio, 277; *Ohio etc. R. R. Co. v. Lawrence Co.*, 27 Ill. 50.) Where by statute an inferior tribunal is clothed with a special jurisdiction, and no appeal is expressly provided, the judgment of such tribunal is conclusive. (*Worthington v. Pike*, 23 Ill. 363; *Ohio etc. R. R. Co. v. Lawrence Co.*, 27 Ill. 50; *Stewart v. Maple*, 70 Pa. St. 221.) And without a special statute giving the right of appeal, the board of equalization are the final arbiters. (*Kimber v. Schuylkill Co.*, 20 Pa. St. 366; *Silver v. Schuylkill Co.*, 20 Pa. St. 369; *Rhoads v. Cushman*, 45 Ind. 85; *Cooley on Taxation*, 529; *Morgan v. Smithson*, 9 Ill. (4 Gilm.) 368; *Wade v. Commissioners of Craven County*, 74 N. C. 81.) The courts, therefore, have not the power to correct errors made by assessors in regard to the valuation of property. (*Shumway v. Baker Co.*, 3 Or. 246.)

Thomas J. Galbraith and Huston & Gray, for Defendant in Error.

No brief on file.

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Opinion of the Court—Prickett, J.

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PRICKETT, J.—The assessor of Custer county, in this territory, for the year 1881, assessed the mill and appurtenances of the plaintiff in error at \$70,000, and bullion on hand at \$170,000. Upon the complaint of the manager of the company, the board of equalization of the county reduced such assessment to \$35,000 on the mill and its appurtenances, and to \$25,000 upon the bullion. From the order of the board reducing the assessment, James H. Van Camp, a private citizen of the county, appealed to the district court of the third judicial district for Custer county. A motion was made in the district court to dismiss the appeal, on the grounds that no appeal is allowed by law from an order of the board of equalization, and that Van Camp was not, in any event, a proper party to take such appeal. The motion to dismiss was overruled. The cause was tried *de novo*, and the court rendered judgment restoring the assessment on the bullion to the original sum of \$170,000, and fixing the assessment of the mill and appurtenances at \$35,000, as fixed by the board.

The questions submitted to this court are the same as were raised in the district court on the motion to dismiss the appeal. Will an appeal lie from an order of the board equalizing assessments? Is it a legal and proper remedy? In order to answer these questions we must look to the statutes, for the right to appeal is purely statutory, unknown to the common law, and it cannot be extended by courts to cases not within the statute.

The defendant in error, to sustain the right of appeal, relies upon section 25 of the act creating the board of county commissioners and defining their duties and powers. (Revised Laws, 529.) It provides that "appeals may be taken from orders of the board of county commissioners, as follows: 1. From any order, by any person aggrieved thereby; 2. From an order allowing an account or demand against the county, by any elector or taxpayer of the county, on the ground of improper or excessive allowance; 3. From any order prejudicially affecting the public interest, by either the district attorney or the probate judge of the county, on behalf of the county."

Section 19 of the same act defines the duties and powers of the board of commissioners; and the twelfth subdivision of that section provides that they shall "act as a board of canvass-

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Opinion of the Court—Prickett, J.

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ers and equalization, and do and perform all other acts required of them by the organic act and laws of Idaho territory not in conflict with this act." Under this last-mentioned provision it is claimed that the board, while equalizing assessments under the revenue law, are discharging duties and exercising powers imposed and conferred upon them as county commissioners. In this connection it is proper to notice that the general meetings of the board of commissioners are required to be held in January, April, July, and October of each year, at all of which meetings "they shall transact any business which may be required of them by law."

Section 22 of the revenue law of this territory (Revised Laws, 487) provides that "the commissioners of the county shall constitute a board of equalization, of which the clerk of the board of commissioners shall be clerk"; and that "the board of equalization shall meet on the third Monday in August in each year, and shall continue in session from time to time until the business of equalization presented to them is disposed of," etc. The provisions and requirements of this section of the revenue law are full and complete, and nothing is added to or subtracted from them by the repetition contained in subdivision 12 of section 19 of the county commissioners' law empowering the commissioners "to act as a board of equalization."

It seems quite clear that the board of county commissioners and the board of equalization are two separate and distinct bodies, created by different acts of the legislature; that by section 22 of the revenue law persons holding the office of county commissioners by election or appointment are invested with another distinct office having a different name. The revenue act, complete in itself, provides what duties the board of equalization shall perform. It requires them to meet and discharge those duties at a time not fixed by law for a meeting of the board of commissioners. It provides them with a clerk, and designates him as the clerk of the board of equalization; and, although the two boards are composed of the same persons, they are as completely different in respect to organization, powers, and duties as if composed of different individuals. There being two separate boards, the right of appeal given by statute from orders

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Argument for Appellant.

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of the board of commissioners does not imply the same right from the orders and decisions of the board of equalization.

We conclude, therefore, that the district court erred in entertaining the appeal, and in denying the motion to dismiss it.

It becomes unnecessary to consider whether Van Camp was a proper party to appeal from an order of the board of commissioners under any circumstances, as the question already disposed of is decisive of the case.

Judgment reversed and the cause remanded with directions to the district court to dismiss the appeal.

Buck, J., concurred.

Morgan, C. J., did not sit at the hearing.

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(February 14, 1884.)

PEOPLE v. AH TOO.

[3 Pac. 10.]

**INSTRUCTIONS.**—In charging a jury the court should give only such instructions as are pertinent to the evidence.

**SAME—CIRCUMSTANTIAL EVIDENCE.**—There was an absence of circumstantial evidence at the trial—the evidence being that of eye-witnesses to the homicide; defendant asked the following instruction: “If the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances be themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive of the defendant for committing the offense charged.” Held, that such instruction was properly refused.

**SAME—ABSTRACT PROPOSITIONS.**—Instructions giving abstract propositions of law, but which have no application to the facts proven, should not be given.

**APPEAL** from District Court, Ada County. Reversed.

Fremont Wood and G. W. Adams, for Appellant.

The rule is, upon a motion for a new trial on the ground of newly discovered evidence, if it is probable that the verdict would be changed, or if it is doubtful how it would affect the verdict, the motion should be granted. (*Jones v. Hartley*, 3

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Opinion of the Court—Buck, J.

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Whart. 189; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *Flannagan v. Newberg*, 1 Idaho, 78; 3 Graham & Waterman on New Trials, 1044; *State v. Logan*, 1 Nev. 509.) In capital cases, when upon a review of the whole testimony the court is not satisfied with the verdict, a new trial will be granted. (9 United States Digest, p. 635, sec. 2643; *Raines v. State*, 33 Ga. 571; 9 United States Digest, sec. 2648; *Falk v. People*, 42 Ill. 331; *Manuel v. People*, 48 Barb. 548; 9 United States Digest, 635, sec. 2658; 9 United States Digest, 636, sec. 2668; *State v. Packwood*, 26 Mo. 340.) The court erred in refusing defendant's instruction, viz.: "If the evidence introduced by the prosecution to establish the guilt of defendant be regarded by the jury as circumstantial, and the circumstances of themselves doubtful, the jury must examine and inquire very closely into the adequacy of defendant's motive for committing such an offense as charged." (1 Parker's Criminal Reports, p. 655; also p. 32.) To refuse such instructions as properly arise upon the record is error. (3 Graham & Waterman on New Trials, 710.)

T. D. Cahalan, District Attorney, for the People.

A new trial should not be granted on the ground of newly discovered evidence unless there is either a total deficiency of evidence or it preponderates so greatly against the verdict as to render it clear that the jury acted under the influence of passion or prejudice. (*People v. Manning*, 48 Cal. 337.) It must be shown that newly discovered evidence could not have been obtained by reasonable diligence, that it is material, not merely cumulative and corroborative or collateral. (Hilliard on New Trials, 375.) Where the evidence is conflicting, the verdict will not be set aside. (*Mootry v. Hawley*, 1 Idaho, 543; *Ainslie v. Idaho etc. Printing Co.*, 1 Idaho, 641; *People v. Gill*, 45 Cal. 285; *Giles v. State*, 6 Ga. 276; 1 Archibald's Criminal Practice, 664.) In criminal cases, the presumption is in favor of the verdict. (*Waller v. State*, 4 Ark. 87; 1 Archibald's Criminal Practice, 663, note b; 3 Graham & Waterman on New Trials, 240.)

BUCK, J.—Ah Too was indicted, tried, convicted, and sentenced at the November term of the district court, 1882, in Ada county, on an indictment for murder in the killing of Ah You. This appeal is taken from the judgment and from the order of

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Opinion of the Court—Buck, J.

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the court overruling the motion for a new trial. The errors assigned in the bill of exceptions, and insisted upon in the argument on appeal are: 1. The refusal of the court to give a certain instruction at request of the defendant; and 2. The order of the court overruling the motion for a new trial. The instruction asked by defendant and refused by the court is as follows: "If the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances by themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive of the defendant for committing the offense charged." The exception to the refusal of the court to give this instruction seems based, by a reference in appellant's brief, upon a principle in 3 Graham & Waterman on New Trials, 710, where it is stated: "To refuse such instructions as properly arise in the case is error." This proposition is conceded to be good law, and it suggests the question, Did the instruction asked for properly arise in this case? While "there is no evidence admissible in a court that does not depend more or less on circumstance for credit" (Wharton's Criminal Evidence, 8th ed., sec. 10), yet it can hardly be claimed that an instruction as to the character and weight of circumstantial evidence should be given in all cases. The court cannot be called upon to charge the jury upon abstract propositions. (3 Graham & Waterman on New Trials, 795.) An abstract proposition may be correct in principle, and yet so irrelevant to the facts as to have no practical bearing upon the issues tried. To give a jury such an instruction would perplex rather than aid them in finding a verdict. In the case at bar there seems to have been an entire absence of circumstantial evidence. The shooting occurred in the daytime, in the midst of several witnesses, and the defendant admitted that the fatal shot came from his revolver, but alleged that the shooting was wholly accidental. The entire evidence was by eye-witness, except the dying declaration of deceased; and those declarations criminating defendant depended entirely upon the credibility of the witness to whom they were said to have been made. We find no element of circumstantial evidence therein. The ruling of the court in refusing this instruction might be sustained on other grounds; but, with a view to correcting the practice

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Points Decided.

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of asking rambling and irrelevant instructions, the court sustains the ruling of the court below, upon the ground that the instruction asked for was properly refused because not pertinent to the evidence in the case.

Upon the second branch of the case, to wit, that the verdict is contrary to the evidence, the court is of the opinion that the objection to the verdict is well taken. In coming to this decision we do not disregard or ignore the principle insisted upon by respondent, to wit, "where the evidence is conflicting, the verdict will not be set aside." Upon an inspection of the evidence we are of the opinion that the case at bar does not come within the rule. As a result of the conclusion of the court will probably be a new trial in the court below, a discussion of the evidence here would be out of place.

The judgment of the court below is reversed, a new trial ordered, and the case is remanded to the district court, Ada county, second judicial district, Idaho territory, for further proceedings.

Morgan, C. J., and Prickett, J., concurred.

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(February 16, 1884.)

## PEOPLE v. STAPLETON.

[3 Pac. 6.]

**BURGLARY—STATUTORY CONSTRUCTION.**—In section 59, Crimes and Punishments, Revised Laws, page 332, wherein it provides that "every person who shall in the night . . . break and enter in a dwelling-house or tent with intent to commit murder, robbery, mayhem, larceny or other felony," the term "larceny" applies alike to grand and petit larcenies.

**INDICTMENT—VALUE OF PROPERTY.**—In an indictment for burglary drawn under the statute it is not necessary to allege the value of the property intended to have been stolen.

**MOTION AND ARREST OF JUDGMENT—OBJECTIONS TO INDICTMENT.**—Objection to an indictment "that it does not substantially conform to sections 233 and 234 of the Criminal Practice Act" cannot be taken advantage of upon a motion in arrest of judgment, under section 426. Such objections, if made at all, must be made by demurrer under section 285 as limited by section 293.

(Syllabus by the court.)

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Opinion of the Court—Buck, J.

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APPEAL from District Court, Ada County. Affirmed.

G. W. Adams, for Appellant.

No brief on file.

T. D. Cahalan, District Attorney, for the People.

BUCK, J.—The defendant, W. S. Stapleton, was tried, convicted, and sentenced at the November term of the district court in Ada county on an indictment for burglary. When called upon to plead, he entered the plea of not guilty, and made no objection to the form or substance of the indictment, by demurrer or otherwise. Upon the rendition of the verdict, the defendant moved an arrest of judgment—1. On the ground that the indictment does not substantially conform to section 234 of the Criminal Practice Act, in that it does not give the legal appellation of the offense attempted to be charged, and is not certain as to the offense attempted to be set forth; 2. That the facts stated in said indictment do not constitute a public offense, in this, that it does not appear upon the face of said indictment that defendant attempted to commit a felony, there being no allegation therein that the value of the goods and property intended to have been stolen by the defendant were of the value of sixty dollars, or of any value.

The assignment of error sets out error in the refusing of the court to grant an arrest of judgment, and, in addition thereto, the refusal to give the following instructions, at the request of the defendant: "1. In order to find the defendant guilty, as charged in the indictment, the jury are instructed that the evidence must prove, beyond a reasonable doubt, that the defendant, with a felonious intent, did attempt to forcibly break and enter the alleged dwelling-house, in the night, with the further felonious and concurrent intent of committing a felony therein by then and there stealing and carrying away the goods, property, and money of J. P. Gordon, therein, being of the value of sixty dollars or more, and this intent to commit said felony must be proved to have existed in the mind of defendant, as a matter of fact, and not as a presumption of law; 2. If the jury are in doubt upon any material fact sought to be



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Opinion of the Court—Buck, J.

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proved by the prosecution, or upon the general evidence introduced as to the guilt of the defendant, they should give the defendant the benefit of the doubt, and acquit." Error is also alleged in the giving by the court of the following instruction: "It is not necessary for the prosecution to prove that the defendant intended to steal sixty dollars' worth of money or property, or more, but it will be sufficient if the jury believe from the evidence, beyond a reasonable doubt, that the said defendant then and there intended to steal any amount, either more or less than sixty dollars' worth of property or money. The intent of the defendant is to be gathered from his acts and all the circumstances."

The first instruction asked by defendant and refused by the court, and the instruction given by the court and excepted to by defendant, both involve the main question at issue in the motion for arrest of judgment (namely, must the intended larceny, as charged in the indictment, necessarily be a felony?) and can be disposed of in the consideration of that branch of the case.

The remaining objection, to wit, the refusal to give the following instruction: "If the jury are in doubt upon any material fact sought to be proved by the prosecution, or upon the general evidence introduced as to the guilt of the defendant, they should give the defendant the benefit of the doubt, and acquit"—involves the question of doubt, which is perhaps of all ideas the most difficult for juries to understand and apply. Section 357 of our Criminal Practice Act (Revised Laws, 415) provides that "in case of a reasonable doubt whether defendant's guilt be satisfactorily shown, he is entitled to be acquitted." The doubt here provided for is a reasonable one, and courts have for years exercised their ingenuity and learning in endeavoring to frame an instruction which would convey to a jury a practical understanding of a reasonable doubt, with little satisfaction to themselves, and probably little assistance to the juries. In the instruction asked for, however, the court is relieved of any effort to define that perplexing term, but is asked to instruct the jury that in case of any doubt they must acquit. Such an instruction, if good in one case, would be good in all, and would render a conviction for

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Opinion of the Court—Buck, J.

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crime almost impossible. The instruction was properly refused.

The first ground upon which the motion in arrest of judgment was asked was that the indictment did not conform to section 234 of the Criminal Practice Act. Section 293 "provides that when the objections mentioned in section 285 of said act appear upon the face of the indictment they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts do not constitute a public offense, may be taken in arrest of judgment." That the indictment does not substantially conform to section 234 is one of the grounds provided for by section 285, and such an objection should be taken by demurrer, unless section 293 is abrogated by section 426. The two sections are apparently inconsistent, and a judicial construction seems necessary to the intelligent understanding of our criminal practice. These two sections are found in the same act, and, if possible, should be so construed as to give force and effect to both. It is not to be presumed that the legislature intended that any part of a statute should be without its proper meaning, force, and effect. The established rule of construction "is that the intention of the lawgiver and the meaning of the law are to be discovered and deducted from a view of the whole, and of every part of the statute, taken and compared together." (Dwarris on Statutes, 188.)

In *People v. Nash*, 1 Idaho, 206, we find the following language in the opinion of the court: "After the verdict the defendant moved in arrest of judgment, and, although several grounds are assigned, we can only consider one of them, because, under section 293, objections which are grounds of demurrer can only be taken advantage of on demurrer, except two, viz., want of jurisdiction of the court, and that the facts do not constitute a public offense. The defendant did not urge the objection on demurrer . . . that the indictment does not conform to the requirements of sections 233 and 234 of the Criminal Practice Act, and she is precluded from raising it afterward, except the objection that the indictment does not show facts constituting a public offense." This question was fully considered in *People v. Shotwell*, 27 Cal. 402. In de-

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Opinion of the Court—Buck, J.

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ciding this branch of the case we cannot do better, perhaps, than to adopt the language of the court in that case as adapted to our statute: "If section 426, which provides that a motion in arrest of judgment may be founded on any of the defects mentioned in section 285, be read without reference to section 293, its language, it may be concluded, is comprehensive enough to embrace the objection made. But we are not at liberty to disregard the two hundred and ninety-third section, inasmuch as section 426 may be interpreted as referring only to the causes for arresting the judgment which stand unaffected by section 293." The alleged defect in the indictment cannot be considered on a motion in arrest of judgment.

The consideration of the remaining objection, to wit, that the alleged intent must be to commit a felony, involves the construction of the statute upon which the indictment was drawn. The statute reads as follows: "Every person who shall in the night-time forcibly break and enter, etc., any house whatever, or tent, with intent to commit murder, rape, mayhem, larceny or other felony shall be deemed guilty of burglary." (Revised Laws, 332, sec. 59.) It is argued by appellant that from the peculiar arrangement, punctuation, and combination of the words "mayhem, larceny or other felony," the intention of the legislature must be interpreted to be that there can be no burglary except the breaking is combined with the intent to commit a felony. The objection to this argument is that larceny in this territory is not necessarily a felony, and no amount of punctuation and illogical combination of words can make it such. It is stated that our statute was taken from California, and, under the authority of *People v. Murray*, 8 Cal. 519, the meaning of the statute has been adjudicated and determined. The decision referred to was made in 1857. In 1858 the legislature of that state, recognizing the validity of the decision, amended the law to conform to it. In 1864 the statute under consideration was enacted by the Idaho legislature. There was no such statute in California at the time, nor had there been for six years prior to the enactment of our statute. It is hardly reasonable to suppose that our legislature would seek a statute in any state with an adjudication which had been regarded for six years as unworthy to be in

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Opinion of the Court—Buck, J.

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their own statute-book, for the purpose of making it a part of our law. The doctrine that in adopting a statute from one state we adopt the adjudication of it, though true, yet is so limited as to be hardly applicable to the case at bar.

The authority cited by appellant in *Campbell v. Quinlan*, 3 Scam. 288, reads: "The construction supposed to be adopted is one that the statute had received by a uniform series of judicial exposition." A single decision, in force but a year, can hardly be called a series of judicial exposition. We are unable to see that the construction insisted upon necessarily follows the statute, nor do we feel assured that the statute was taken from California. It is an exact copy of the Massachusetts law, and is also the common law upon that subject, except that the word "felony" is left out and specific felonies substituted therefor, and larceny added thereto. At common law burglary is defined to be (2 Archibald's Criminal Practice and Pleading, 263) the crime of breaking, etc., with intent to commit a felony. Under our statute that crime is defined, the act of breaking, etc., with intent to commit robbery, mayhem, larceny or other felony. We have no authority to add the word "grand" or "petit" to the term "larceny." Larceny is general, and includes both grand and petit. In Massachusetts all larceny was a felony, and their law, in the exact words of ours, punished all breakings with intent to commit larceny of any grade. We think our legislature intended the same thing. The Massachusetts law punishes burglaries where the intent to commit larceny over \$100 with a more severe penalty than where the amount was less than \$100. Our legislature might have made a distinction in the punishment between burglaries with intent to commit grand and petit larceny, but they have not yet done so, and the penalty is the same, whatever the amount intended to have been stolen.

The judgment below is affirmed.

Morgan, C. J., and Prickett, J., concurred.

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Argument for Respondent.

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(February 16, 1884.)

UTAH AND NORTHERN RAILWAY COMPANY v.  
FISHER, COUNTY ASSESSOR.

[3 Pac. 3.]

**TERRITORIAL LIMITS—TREATIES WITH INDIANS.**—None of the lands embraced within the boundaries of Idaho territory are excepted out of said territory by the provisions of section 1 of the organic act, except such as, by the provisions of pre-existing treaties with Indian tribes, were not, without the consent of such Indian tribes, to be included within the limits of any state or territory.

**SAME.**—At the time of the passage of the organic act of Idaho territory no treaty existed between the United States and any Indian tribe providing that the lands embraced within the Fort Hall Indian reservation should not, without the consent of such tribe, be included within any state or territory; such lands, therefore, became part of Idaho territory upon the passage of such organic act, March 3, 1863, and have not since been withdrawn from or excepted out of said territory.

**INDIAN RESERVATION—ASSESSMENT FOR TAXATION.**—The Fort Hall Indian reservation being a part of, and included within, Idaho territory and Oneida county, the property of the Utah and Northern Railway Company situated thereon is subject to taxation for territorial and county purposes.

(Syllabus by the court.)

APPEAL from District Court, Oneida County. Affirmed.

Williams &amp; Young, for Appellant.

On behalf of the appellant we submit this case upon the authority of *Harkness v. Hyde*, 98 U. S. 476. The court is familiar with the origin and history of that case, as well as the principles laid down in the decisions. We submit that if the process of the district court of the third judicial district in and for Oneida county cannot run upon the Fort Hall Indian reservation, as was held in that case, for the same reason the taxing power of neither the county of Oneida nor the territory can extend to property situated within its limits.

William Crawford, for Respondent.

On behalf of the respondent, it is suggested that the authority relied upon by the appellant, to wit, the case of *Hark-*

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Opinion of the Court—Prickett, J.

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*ness v. Hyde*, 98 U. S. 476, is overruled by the decision of the United States supreme court in the action of *Langsford v. Montieth*, 102 U. S. 145, with which decision this court is familiar, and upon which decision and principles laid down therein respondent confidently relies for an affirmance of the judgment of the district court.

PRICKETT, J.—This appeal has been submitted upon briefs, without oral argument. The facts as shown by the record are that the Utah and Northern Railway Company is a corporation owning and operating the Utah and Northern Railway, extending into and through the county of Oneida in this territory; that sixty-nine and eighteen one-hundredths miles of said railway is within and upon the Fort Hall Indian reservation, a tract of land situated within the exterior boundaries of said Oneida county, but which, by an order of the President of the United States, dated July 30, 1869, in pursuance of a treaty with the eastern band of Shoshones and the Bannock tribe of Indians, concluded July 3, 1868, was set apart as a reservation for the Bannock Indians; that the respondent, being the assessor and *ex-officio* tax collector of said Oneida county for the year 1882, assessed plaintiff's railroad and other property situated upon said reservation; that there was levied upon the railroad and property situated upon the reservation for the year 1882 a tax for territorial and county purposes of \$4,478.42; that such tax not having been paid within the time required by law, the defendant, as tax collector, was proceeding to enforce and collect the same under the laws of the territory, by advertisement and sale of the property, when the plaintiff commenced this action to enjoin and restrain him therefrom; a temporary injunction was issued, which at the trial was by the judgment of the court dissolved and set aside, and the defendant also recovered judgment for costs. From that judgment the plaintiff appealed to this court.

The sole question presented for the consideration and decision of this court is whether or not the Fort Hall Indian reservation is a part of Idaho territory and of Oneida county. The act of Congress organizing the territory of Idaho, approved March 3, 1863 (12 U. S. Stats. 808), includes within its ex-

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Opinion of the Court—Prickett, J.

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terior lines the tract of land now known as the Fort Hall Indian reservation, and by the act of the legislative assembly of this territory creating and defining the boundaries of Oneida county, it is included within the exterior boundaries of that county; but section 1 of the organic act of the territory contains a proviso as follows: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by such treaty with the United States and such Indians, or to include any territory which by treaty with any Indian tribes is not, without the consent of said tribe, to be included within the territorial limits of jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said territory or to affect the authority of the government of the United States and make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise which it would have been competent for the government to make if this act had never passed." No provision similar to the foregoing is to be found in any act of Congress creating a territory prior to that organizing the territories of Nebraska and Kansas (10 U. S. Stats. 277), and the reason for it in that act was that before the organization of those territories the United States, by treaty with the Shawnee tribe of Indians, and perhaps other tribes, occupying lands embraced in those territories, had agreed not, without their consent, to include any of their lands within any state or territory thereafter to be formed; and for the same reason Congress required a like provision to be incorporated into the constitutions of Kansas and Nebraska, before admitting them into the Union. The form of the organic act of those territories, in this respect, seems to have been uniformly followed by Congress in organizing the other territories created since that time, without reference to the question whether such proviso was needed to save and protect any rights previously guaranteed or not. It is not claimed that prior to the passage of the organic act of Idaho any treaty existed containing pro-

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visions similar to those in the treaty with the Shawnees, which would exclude or except out of the territory any portion of the lands embraced within the Fort Hall Indian reservation. Such lands were, therefore, included within the territory, March 3, 1863, by the terms of the organic act.

The proviso in the act creating the territories of Kansas and Nebraska, similar to that found in section 1 of our organic act above set forth, was several times considered and construed by the courts in Kansas.

In the case of *McCracken v. Todd*, 1 Kan. 148, taken by writ of error to the supreme court of Kansas, one of the questions presented was whether certain judicial proceedings which took place on the lands belonging to the Delaware Indians, when Kansas territory was organized, were not transacted without the territory, and therefore null and void. That court, after reciting the proviso, say: "This ground of objection calls for no comment by the court further than a statement that nowhere in any treaty with the Delaware Indians is there a provision that the lands of that tribe shall not, without its consent, be included within the territorial limits of any state or territory. All the lands of that tribe, within the boundaries specifically described in the law referred to, were therefore included within the limits of the territory." In the case of *United States v. Ward*, Woolw. 17, McCahon, 199, 1 Kan. 601, Fed. Cas. No. 16,639, the circuit court of the United States for Kansas, Miller, J., presiding, held that the state court, and not that of the United States, had jurisdiction to try and punish for the crime of murder committed upon the Kansas reservation, because the treaty with the Kansas Indians contained no provision excepting their reservation from the territorial limits or jurisdiction of any state or territory.

The lands embraced within the Fort Hall Indian reservation having been included within and made a part of the territory by section 1 of our organic act, passed March 3, 1863, we will next inquire whether those lands have since been withdrawn therefrom. If so, it must be because of some provision in the treaty between the United States and the eastern band of Shoshones and the Bannock tribe of Indians, concluded July 3, 1868, and of the executive order made in pursuance



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thereof (15 Stat. 673), for it is by and under these that the Bannock tribe of Indians occupy said reservation. Section 2 of that treaty provides as follows: "It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the Port Neuf and Kansas (meaning Camas prairie countries), and that, when this reservation is declared, the United States will secure to the Bannocks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshone reservation." On the thirtieth day of July, 1869, in pursuance of this treaty, the President, by order of that date, set apart the Fort Hall Indian reservation for the use and occupation of the Bannocks; but there is nothing in this treaty or order from which to imply that such tract of land was withdrawn from or taken out of the territory of Idaho. It was set apart merely for the use and occupation of the Bannock tribe of Indians.

The appellant relies for the reversal of the judgment in this case upon the decision of the supreme court of the United States in *Harkness v. Hyde*, 98 U. S. 476. That court there held that the territory embraced within the Fort Hall Indian reservation was "as much beyond the jurisdiction, legislative or judicial, of the government of Idaho as if it had been set apart within the limits of another country or of a foreign state," which would certainly be conclusive in favor of the position assumed by the appellant but for the decision of the same court upon the question subsequently rendered in the case of *Langford v. Monteith*, 102 U. S. 145, which is relied upon by counsel for respondent. In the last case cited Mr. Justice Miller, delivering the opinion of the court, says: "The act of Congress of March 3, 1863, to provide a temporary government for the territory of Idaho (12 Stat. 808), contains a clause precisely similar to that admitting Kansas into the Union. This court, in *Harkness v. Hyde*, *supra*, relying upon

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Argument for Appellant.

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an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this, it seems, we were laboring under a mistake. Where no such clause, or language equivalent to it, is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the territory and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction." The decision in the case of *Harkness v. Hyde* is therefore no longer authority upon the point made in the appellant's brief.

Our conclusion is that the railroad and property of the appellant is subject to taxation, notwithstanding its location and situation upon the Fort Hall Indian reservation.

The judgment of the district court is affirmed.

Morgan, C. J., and Buck, J., concurred.

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(February 18, 1884.)

JONES v. ST. JOHN IRRIGATING COMPANY.

[3 Pac. 1.]

**APPEAL—JUDGMENT-ROLL—BILL OF EXCEPTIONS.**—On appeal from a judgment without a statement or bill of exceptions, nothing belongs to the record except the judgment-roll, and no question arising outside the roll can be considered. The mode of presenting questions not arising on the judgment-roll for review on appeal is by statement or bill of exceptions.

**REVERSIBLE ERROR—PARTIES.**—On appeal, this court can only notice the errors committed against the appellant, not those committed against the successful party.

(Syllabus by the court.)

**APPEAL** from District Court, Oneida County. Affirmed.

Heed & Standrod and James L. Onderdonk, for Appellant.

Plaintiff was entitled to judgment upon the pleadings, as the answer is evasive and raised no issue. (Code Civ. Proc.,

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sec. 237, subd. 2, sec. 259; *Higgins v. Wortell*, 18 Cal. 330; *Fitch v. Bunch*, 30 Cal. 208; *Kuhland v. Sedgwick*, 17 Cal. 123; *Doll v. Good*, 38 Cal. 287; *Norris v. Glenn*, 1 Idaho, 590.) No proof of damages was required as no issue was made upon that point. Defendant undertakes to deny the character of the act, and does not deny the act itself. Such denials have always been held to be bad. (*Patterson v. Ely*, 19 Cal. 28; *Huston v. Twin etc. T. R. Co.*, 45 Cal. 550; *Feely v. Shirley*, 43 Cal. 369; *Lay v. Neville*, 25 Cal. 546; *Blackman v. Vallejo*, 15 Cal. 638; *Woodworth v. Knowlton*, 22 Cal. 169.)

Smith & McCollum, for Respondent.

This is an action for the recovery of money, purely, and the judgment being for less than one hundred dollars, the court below was prohibited from allowing costs to either party. (See Code Civ. Proc., sec. 696. Also *Britton v. Wright*, 1 G. Greene (Iowa), 426. Also *Rathbone v. McConnell*, 21 N. Y. 467.) This error can be corrected here and the judgment so modified as to deny costs allowed to appellant, and this it is the duty of this court to do. (See *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 260. Also *Love v. Shartzler*, 31 Cal. 487. Also *Atherton v. Fowler*, 46 Cal. 320)

PRICKETT, J.—This action was commenced in the district court of Oneida county, by the filing of a complaint therein September 12, 1883. The object of the action was to recover, as damages, the sum of \$1,000, alleged to have been sustained by the plaintiff by reason of the diversion by defendant of water from plaintiff's premises, to which he alleges he was entitled for irrigation. The amended answer of the defendant denies that it at any time diverted any water from the stream named to which plaintiff was entitled, and denies that plaintiff has been injured by the defendant in the sum of \$1,000, or any other sum whatever. Upon the issues made by the complaint and amended answer the cause was tried by jury, and a verdict and judgment were rendered for plaintiff for the sum of fifty dollars. A question having arisen in the court below, as to whether the plaintiff was entitled to recover his costs, upon a verdict for less than \$100, under the statutes, the court below

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awarded the plaintiff his costs. The plaintiff appealed from the judgment.

A paper, purporting to be a bill of exceptions, has been stricken out of the transcript, on motion, because it was not settled and filed in the mode prescribed by the statute, and the case now stands for review on the judgment-roll alone. On an appeal from a judgment without a statement or bill of exceptions nothing belongs to the record except the judgment-roll, and no question arising outside the judgment-roll can be considered. The mode of presenting questions not arising on the judgment-roll, for review on appeal, is by statement or bill of exceptions, properly settled, signed, and filed.

It is urged by the appellant's counsel that, though the court has stricken out the bill of exceptions, the chief question in dispute can be reviewed upon the record as it still stands; that there is no issue formed by the complaint and amended answer; that the amended answer is evasive; and that the plaintiff was entitled to judgment on the pleadings in the court below. But we think the denials of diversion by the defendant, and of damages sustained by the plaintiff, do certainly raise material issue between the parties to the action.

Another point made by the appellant's counsel is that the amended answer, after filing and verification, was again amended by striking out certain matter, and that, after being so reamended, it was never verified, and that it thus became an unverified answer to a verified complaint, and for that reason should not be considered as an answer at all. But these objections do not appear upon the face of the judgment-roll, and, if they existed, should have been brought into the record by the proper objections and bill of exceptions.

On the part of the respondent it is urged that, under our statutes, in an action for damages, where the plaintiff recovers less than \$100, he is not entitled to costs, and that the allowance of costs to the plaintiff by the district court was error, which can and should be corrected here; but, on appeal, this court can only notice the errors committed against the appellant, not those committed against the successful party, or the respondent in the appeal. (*Seaward v. Malotte*, 15 Cal. 304;

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Argument for Appellant.

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*Travers v. Crane*, 15 Cal. 12; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107.)

The judgment is affirmed.

Morgan, C. J., and Buck, J., concurred.

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(February 19, 1894.)

WINTERS v. SWIFT.

[3 Pac. 15.]

**CONVEYANCE—DEED—MORTGAGE—CONSTRUCTION OF CONTRACT.**—A deed absolute on its face given by A to B for real estate therein described, and a bond given by B to A, agreeing to convey to A a portion of the same property at a stipulated time, although given on the same date and for the same price, if not intended to be a mortgage or security for money by the parties themselves and not appearing to be such on the face of the instrument, will be held to be an absolute bargain and sale, and not a mortgage.

**CONTRACT—CONSTRUCTION—INTENTION OF PARTIES—EVIDENCE.**—The intention of the parties is to be ascertained—1. From the instruments themselves; 2. From parol testimony, and, when ascertained, will be carried out by the courts.

**LEX LOCI—QUESTION OF USURY.**—The question as to whether a note which is made and delivered in Utah is usurious or not is to be decided by the laws of Utah.

**APPEAL** from District Court, Alturas County. Affirmed.

F. Ganahl, L. Vineyard and D. E. Waldton, for Appellant.

The law declares this transaction a mortgage. If not a mortgage at law, the presumption is in equity, it will be so held. That if there be a doubt as to the nature of the transaction, and the relation of debtor and creditor existed at its inception, the doubt will be solved in favor of the debtor and the transaction held to be a mortgage. At law an absolute deed and separate defeasance or agreement to reconvey, executed at the same time, amount to a mortgage. (*Colwell v. Woods*, 3 Watts, 188; *Jaques v. Weeks*, 7 Watts, 261; *Huling v. Drexell*, 7 Watts, 126; *Rankin v. Mortimere*, 7 Watts, 372; *Kerr v. Gilmore*, 6 Watts, 405; *Brown v. Nickle*, 6 Pa. St. 390;

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*Wilson v. Shoenberger*, 31 Pa. St. 295; *Reitenbaugh v. Ludwig*, 31 Pa. St. 131; *Bayley v. Bailey*, 5 Gray, 505; *Haines v. Thomson*, 70 Pa. St. 434; *Sweetzer's Appeal*, 71 Pa. St. 264; *Taylor v. Weld*, 5 Mass. 109; *Kelleran v. Brown*, 4 Mass. 443; *Carey v. Rawson*, 8 Mass. 159; *Erskins v. Townsend*, 2 Mass. 493, 3 Am. Dec. 71; *Newhall v. Burt*, 7 Pick. 156; *Stocking v. Fairchild*, 5 Pick. 181; *Newhall v. Pierce*, 5 Pick. 450; *Rice v. Rice*, 4 Pick. 349; *Eaton v. Whiting*, 3 Pick. 484; *Trull v. Skinner*, 17 Pick. 213; *Lanfair v. Lanfair*, 18 Pick. 299; *Peterson v. Clark*, 15 Johns. 205; *Clark v. Henry*, 2 Cow. 324; *Bloodgood v. Zeily*, 2 Caines Cas. 124; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Robinson v. Cropsey*, 6 Paige, 480; *Brown v. Dewe*, 1 Sand. 56; *Slee v. Manhattan Co.*, 1 Paige, 48; *Dry v. Dunham*, 2 Johns. Ch. 189; *Henry v. Davis*, 7 Johns. Ch. 40; *Barton v. May*, 3 Sand. 450; *Palmer v. Gurnsey*, 7 Wend. 248; *Baker v. Thrasher*, 4 Denio, 493; *Murphy v. Calley*, 1 Allen, 107; *Polhemus v. Trainer*, 30 Cal. 687; *Gay v. Hamilton*, 33 Cal. 686; 1 Jones on Mortgages, sec. 244.) "When the conveyance, and the agreement to reconvey, are on their face of even date, the transaction is necessarily a mortgage, and parol evidence of a different understanding by the parties will not be received to convert it into a conditional sale. When the two instruments are of different dates, such evidence is admissible." (1 Jones on Mortgages, sec. 248; *Kerr v. Gilmore*, 6 Watts, 405; *Brown v. Nichol*, 6 Pa. St. 390.) The continued possession of the grantor is also evidence tending to show that the conveyance was a mortgage. (*Spencer v. Weatherly*, 1 Jones, 328; *Ruffier v. Womach*, 30 Tex. 332; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Steel v. Black*, 3 Jones Eq. 427; *Streater v. Jones*, 3 Hawks, 423; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Kemp v. Earp*, 7 Ired. Eq. 167; *Thompson v. Banks*, 2 Md. Ch. 430; *Crews v. Thundergill*, 35 Ala. 334; *Daubenspeck v. Platt*, 22 Cal. 330.) Inadequacy of price is also a circumstance tending to show that the transaction is a mortgage rather than a sale. (*Spencer v. Weatherly*, 1 Jones, 328; *Davis v. Stonestreet*, 4 Ind. 101; *Wilson v. Patrick*, 34 Iowa, 362; *Trucks v. Lindsey*, 18 Iowa, 504; *West v. Hendrix*, 28 Ala. 234; *Overton v. Bigelow*, 3 Yerg. 513; *Gibbs*

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Argument for Respondent.

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*v. Penny*, 43 Tex. 560.) The McCormick note secured by the trust deed (Exhibit "L") was executed by Jaikowski, at Ketchum, Idaho territory, and not in Utah; the property affected by and embraced in the trust deed is situated in Idaho. The *lex loci contractus*, and *lex rei situs* are the laws of Idaho, and under them the contract and security are alike void as to the interest.

(2 Parsons on Contracts, pp. 571-575; 1 Jones on Mortgages, 656, 661, 662.) This point, however, was not properly before the court below and should not have been decided, for it only became material on the question of accounting and the amount to be paid on redemption after the court had decided that the transaction was a mortgage, and having decided it to be a conditional sale, this question ceased to be material.

James H. Beatty, for Respondents.

The McCormick note of \$6,000 was finally executed and delivered in Utah territory (228), and the stipulated interest is legal in Utah (Finding 28, p. 102). The note was neither void nor usurious. (*Miller v. Tiffany*, 1 Wall. 309; 2 Kent's Commentaries, 460.) Appellant does not in his bill show, nor has it in any way appeared, that he ever offered, or is ready to redeem, or to pay what the court may order, or to comply with its decrees, but instead, with much assurance, asks the court to declare void all of Jaikowski's debts which Swift had assumed and paid. Instead of doing equity, while pretending to seek it, appellant asks the court to do a most iniquitous act. His bill does not entitle him to relief. (1 Daniell's Chancery Practice, 188, 189; Story's Equity Pleading, sec. 187.) Respondent insists that beyond question the law is: 1. That when a deed is absolute and unconditional in form, and there is no other instrument so referring to or modifying it as to constitute a defeasance thereto, the former must, *in all cases*, be held an absolute conveyance, until shown otherwise by evidence *aliunde* the instruments; 2. That to show it otherwise the actual *intention* of the parties is the test; and 3. Such intention must be shown by evidence *so clear as to leave no doubt*. (*Holmes v. Grant*, 8 Paige, 243, 257; *Glover v. Payn*, 19 Wend. 519; *Flagg v. Mann*, 14 Pick. 467; *Hughes v. Sheaff*, 19 Iowa, 343;

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*Robinson v. Cropsey*, 2 Edw. Ch. 138; *Conway v. Alexander*, 7 Cranch, 235; *People v. Irwin*, 14 Cal. 428; *Henley v. Hotaling*, 41 Cal. 22-28; *Page v. Vilhac*, 42 Cal. 78; *Farmer v. Grose*, 42 Cal. 171-173; *Turner v. Kerr*, 44 Mo. 429; *Pitts v. Cable*, 44 Ill. 103; *Hanford v. Blessing*, 80 Ill. 189, 191; *Bingham v. Thompson*, 4 Nev. 232; 1 Jones on Mortgages, secs. 258, 260, 261.) To constitute a mortgage, in addition to the mortgagor's right of redemption, the mortgagee must have the right of enforcing the collection of his debt against the mortgagor as well as the property. (7 Cranch, 237, *supra*; 41 Cal. 28, *supra*; 42 Cal. 173, *supra*; 2 Edw. Ch. 144, *supra*; 14 Pick. 478, *supra*; 44 Ill. 106, *supra*; 1 Jones on Mortgages, sec. 264.) When the instruments show a conditional sale, or an absolute sale with option of repurchase as in this case, the terms of repurchase must be complied with, and if not the party will be without relief. (41 Cal. 27; 44 Mo. 433; 19 Iowa, 344; 1 Jones on Mortgages, secs. 264, 267, 258.)

MORGAN, C. J.—It appears from the evidence and the findings of the court in this cause that Wilhelm Jaikowski was the owner and in possession of two-thirds interest in the North Star mine and one-half interest in the American Eagle mine, both situated in Warm Spring district, Alturas county, Idaho; that one Riley was the owner of the one-third of the North Star mine and one-half of the American Eagle; that in working said mine Jaikowski, prior to the seventh day of September, 1881, had become indebted to Pinkham & Leonard in the sum of \$2,082.98, for which he had given his note and mortgage on one-third of the North Star mine, dated, respectively, January 7, 1881; that he was then also indebted to J. O. Swift & Co., a firm composed of J. O. Swift and T. E. Clohecy, both defendants herein, to the amount of between three and four thousand dollars; that to pay off said indebtedness, and obtain means to work said mines, Jaikowski, about the 1st of March, A. D. 1881, employed defendant Clohecy to go to Salt Lake City and procure a loan of \$6,000; to enable Clohecy to secure said loan, Jaikowski executed to said Clohecy a note for \$6,000, with place where payable and name of payee in blank,



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dated March 1, 1881, and due in five months from date; he also executed to Clohecy a power of attorney to sell or mortgage his interest in said North Star mine; that Clohecy thereupon went to Salt Lake City, and secured a loan from McCormick & Co., in the sum of \$6,000; that Clohecy delivered to said McCormick & Co. the said promissory note, properly filled out and indorsed by him; that he also, for the purpose of securing said note, executed a trust deed conveying Jaikowski's interest in the North Star mine to William H. Greenhow and George A. McCormick, with power to them or the sheriff of the county to sell said interest on default of payment of the debt. With the \$6,000 thus obtained, Clohecy paid off various items of indebtedness due from Jaikowski, including the debt due Pinkham & Leonard.

During the summer of 1881 Jaikowski made various attempts to sell his interest in the North Star mine, employing Clohecy and others to aid him in effecting said sale. The mine was not sold. The latter part of August Jaikowski went to Salt Lake; the note and trust deed were coming due September 1, 1881. Jaikowski attempted to get further time on the \$6,000 note, which was refused by McCormick & Co. About the 1st of September J. O. Swift, defendant, went to Salt Lake City, and, at Jaikowski's request, went with him to various persons to effect a sale of the mine, but was unable to do so. After all these failures to sell Jaikowski's interest in these mines, during which he had offered the whole for \$12,000, he (Jaikowski) offered to sell to Swift, on the sixth day of September, 1881, two-thirds of the two mines, all the ore on the dumps, with the cabin, tools, cooking utensils at the mine, and his claim for contribution against Riley, his partner, if Swift would pay the debt to McCormick & Co., his debt to J. O. Swift & Co., and furnish him money to go back to Idaho. Swift, after seeing McCormick & Co., and obtaining further time on that debt, on the seventh day of September told Jaikowski that he would accept his offer, and would pay the debt to McCormick & Co., and the debt to J. O. Swift & Co., and would furnish him sixty dollars to return to Idaho, if Jaikowski would sell the property to him at that price. The terms above stated being agreed

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upon by both parties, they went together to the office of W. C. Hall, an attorney, the terms of the sale were stated to the attorney in the presence of both parties, and he was directed to draw up a deed for two-thirds of both mines, a bill of sale of all the ores on the dump of said mines, all the tools, cabin, cooking utensils, and an assignment of Jaikowski's claim for contribution against his mining partner, Riley, for the consideration aforesaid, which was stated to be \$11,058.49. The attorney drew the said deed, assignment of claim for contribution, and bill of sale of tools, etc., all absolute on their face, according to instructions given in the presence of both parties. These papers were duly signed by Jaikowski and acknowledged before a commissioner of deeds, the parties going to another office for the purpose of acknowledgment.

Shortly after the execution of these papers, and the same day, the parties again appeared in the office of Hall, the attorney aforesaid, and Swift directed Hall to draw up a bond for the conveyance of the two-thirds interest in the two mines, by Swift to Jaikowski, on or before the seventh day of December, A. D. 1881, in case the latter should pay him the sum of \$11,058.49. This was accordingly done, signed by Swift, and delivered to Jaikowski. As soon as the papers were completed, Swift went with Hall to McCormick & Co., paid the interest on the \$6,000 to September 1, 1881, amounting to \$1,080, assumed in the name of J. O. Swift & Co., his firm, the payment of the note of \$6,000, in consideration of which McCormick reduced the rate of interest to one per cent per month. On the same day Swift wrote to his firm at Ketchum stating that he had bought out Jaikowski, and directed them to charge the account due the firm from Jaikowski to his private account, which was accordingly done. Swift paid Jaikowski the sixty dollars to return to Idaho, and also paid for Jaikowski ten dollars to the attorney for drawing the papers.

In the latter part of September, or 1st of October, Swift went into possession of the mines and other property, and has continued to hold and work them until the present time. On the tenth day of October, 1881, Jaikowski executed to one Shaeffer, consideration being an open account, \$432, or \$452, and some

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small sums of money, the amount of which the parties were not able to state, a deed for the two-thirds interest of the said mines, and assigned to him the bond. This sale, as Winters, plaintiff herein, testifies, was negotiated and promoted by him, and he states he had had his eye on this property as being valuable ever since he came to Wood River. On the 17th of November, 1881, Shaeffer executed to plaintiff, Winters, a deed of said property, and assigned to him the bond. On the third day of December, 1881, plaintiff, John B. Winters, commences this suit, files his complaint praying that said deed to Swift, of September 7, 1881, and bond to Jaikowski be declared a mortgage, and that said plaintiff be allowed to redeem; that, to ascertain the amount to be paid to Swift, an accounting be had between J. O. Swift & Co.—T. E. Clohecyc and J. O. Swift—and Jaikowski, with various other prayers not now necessary to mention.

To the said complaint the defendant Swift answered, and averred that the said transaction that took place between himself and Jaikowski on said seventh day of September, 1881, was an absolute bargain and sale of all said Jaikowski's interest in said mines to defendant Swift; was never intended or understood by either party to be a mortgage; that said bond was executed and delivered to said Jaikowski to give him an opportunity to repurchase said mines if he desired so to do on or before the said seventh day of December, 1881. Defendant Clohecyc answered, denying any interest in the transaction of September 7, 1881, or any interest in the result of the suit, substantially. The cause was tried before the court at the July term of the district court in and for Alturas county, and resulted in the following findings by the court as conclusions of law: "1. That the transaction of the 7th of September, 1881, between Jaikowski and the defendant Swift was one of bargain and sale, and not one of security for debt; there being no pre-existing debt, no loan at the time, and no continuing indebtedness, there could be no mortgage, and the deed operated as an absolute sale and conveyance of the property to Swift; 2. That the bond from Swift to Jaikowski was not a defeasance of the deed, but simply an option to repurchase; 3. Neither Jaikowski nor his assigns having tendered the stipulated price within the period limited, the plaintiff is not entitled to relief; 4.

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That, upon the whole case, the equities are with the defendants and they are entitled to judgment for the dismissal of plaintiff's bill of complaint and for their costs in the action." Plaintiff made a motion for a new trial, which motion was denied by the court. From the judgment of the court denying the motion for a new trial an appeal is taken to this court, and the following errors assigned: The court erred in its conclusions of law, and the same are not justified or supported by the evidence in the case, in this, to wit: "1. The transaction of the 7th of September, 1881, between Jaikowski and Swift was one of mortgage and not of sale, there being a pre-existing and continuing debt carrying interest beyond the seventh day of September, 1881; 2. The bond from Swift to Jaikowski being signed on the same day, and witnessed by the same parties, and acknowledged by and before the same officer, expressing the same consideration and for the same property as that in the deed from Jaikowski to Swift, was a defeasance to the deed and constitutes with it one instrument, viz., a mortgage, and the action being brought for a redemption and praying an account, no tender was necessary; 3. The promissory note of McCormick & Co. is usurious and no claim for interest thereon can be collected, as the same was made and delivered in this territory and not in Utah; 4. That upon the whole case the equities were with the plaintiff—in debt, pressed by his creditors, wanting time, everything tends to show that he was not a free man—and that in doubtful cases of like character the law always construes transactions of like character a mortgage and not a sale."

It will be at once seen that the main question, in short, almost the only question, before the court, is, Was the transaction between Swift and Jaikowski on the 7th of September, 1881, a sale, with a bond giving Jaikowski an option to repurchase, or was it a mortgage? In construing any instrument the first matter to be examined is the language of the instrument itself. The ordinary provision in a legal mortgage is that in case the grantor shall pay or cause to be paid the sum mentioned in the deed, with interest thereon, then the deed shall be void, otherwise, etc., or any words equivalent to these in the deed itself which shall indicate that it was intended as a security for money loaned, or security for the payment of

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a debt by the parties to such instrument, then it is a mortgage. (1 Jones on Mortgages, sec. 242; *Adams v. Stevens*, 49 Me. 362.) Upon the most cursory reading it will be at once seen that the deed from Jaikowski to Swift, executed on the 7th of September, 1881, contains no such provision, and none equivalent thereto; it is a deed pure and simple; it is not claimed to be other than an ordinary deed in and of itself. Was there any separate deed executed at the time, or soon thereafter, which was intended by the parties as a defeasance?

It is claimed by the plaintiff that a bond for a deed, which was executed by Swift to Jaikowski soon after the deed was executed, was a defeasance, and was so intended by the parties thereto. The same rules of construction must be applied to this as to the other, that is—(1) Does the instrument itself show upon its face that it was so intended? Upon examination it will be seen that it makes no reference to the deed whatever. There is nothing in it which shows that it had any reference whatever to the deed that had before been executed. There is nothing in it which indicates that Jaikowski was indebted to Swift in any sum whatever; nor is there anything in the deed which indicates that Jaikowski is indebted to Swift. Taking both instruments together, and assuming that they were both executed at the same time, and there is nothing which shows that they were intended as a mortgage. There is no obligation on the part of Jaikowski to pay, and no continued indebtedness, and no intimation of such an obligation. In this case the defendant Swift had no remedy against the person of Jaikowski; there was nothing in either or both of the papers executed which would enable Swift to obtain a judgment against Jaikowski. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. These must exist in order to constitute it a mortgage. (See *Conway v. Alexander*, 7 Cranch, 236; *Henley v. Hotelling*, 41 Cal. 28; *Farmer v. Grose*, 42 Cal. 169; *Flagg v. Mann*, 14 Pick. 478.)

There being nothing in the deed, nothing in the bond, nothing in both, if construed together, to constitute the transaction a mortgage, we must next inquire into the intention of the parties at the time the deed was executed. This is to be gathered from the testimony. Hall, the attorney who drew the deed,

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and who is a disinterested witness, testified that Swift and Jaikowski came into his office. "Swift, in presence of Jaikowski, said he had bought a two-thirds interest in North Star and American Eagle; asked me to draw a deed, which I did, and explained the legal effect thereof to Jaikowski. The parties agreed upon the consideration and I put it in. Some time after deed and bill of sale of cabin and tools were executed, Swift said he had concluded to give Jaikowski a bond, so that he might have a chance to turn round, which I then drew up, and Swift signed it. There was nothing said about its being intended as a mortgage or security for any debt. I would not be positive. When the deed was signed something was said about giving bond back. The bond was signed when Swift came back, within half an hour."

Swift, defendant, testifies Grosbeck and Jaikowski had been talking about a sale. Jaikowski told me about Grosbeck wanting the property. I went to Grosbeck and told him I would take half the mines if he would take half at \$12,000. Grosbeck refused. Jaikowski offered both mines, North Star and American Eagle, for \$12,000. I did all I could to assist him to sell the property. I offered to Chambers to buy the property with him, but he also refused. I went to several mining men after that for Jaikowski, but could get none of them to take it. Jaikowski came to me every day to do something with the property. On the 6th of September, 1881, Jaikowski said if I would pay the McCormick & Co. note and the J. O. Swift & Co. debt, and give him money enough to go back to Wood River, he would give me his entire interest in the two mines. I told him I would see McCormick, and that I might trade with him. Saw McCormick, and then told Jaikowski I would take property at his proposition. Deed was drawn up and acknowledged. I paid the interest on McCormick's note and assumed the payment of the note, assumed payment of J. O. Swift & Co. debt, paid Jaikowski sixty dollars and Hall ten dollars. When we were coming back from getting deed acknowledged I told Jaikowski I would give him a bond for ninety days if he wanted. We went back to Hall's office, and I did so. The transaction between us was understood to be a sale, and not a mortgage.

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The bond was spoken of first when we were returning from having deed acknowledged.

On the twenty-eighth day of October, 1881, Jaikowski made an affidavit before Greenhow that the sale to Swift was absolute and *bona fide*, and was not made as a security for payment of any debt; that Shaeffer and Winters, plaintiff, had induced him while intoxicated to make an affidavit to the contrary.

Peter Wise testifies that between the 10th and 15th of September, 1881, Jaikowski, after his return from Salt Lake, said that he had sold North Star and American Eagle to Jim Swift, told me the terms, and said he was glad Swift had taken it, for he did not want McCormick to get it for the \$6,000, and that Swift had given him a bond. Stiner testifies that he had a conversation with Jaikowski in September or October, 1881, in presence of Wise, in which Jaikowski said he had sold the North Star and American Eagle to J. O. Swift. Greenhow and Clohecy testify to similar conversations with Jaikowski, in which he told them he had sold all out to Swift.

On the part of the plaintiff, Jaikowski testifies as follows: On the 6th of September, 1881, I met Swift, and he said if I would give him security on the North Star and American Eagle mines, my claim against Owen Riley for his one-third due for all the debts incurred on the North Star, embracing the McCormick & Co. claim of \$6,000 and interest, and the debt to Swift & Co., claimed to be \$3,598.15, my cabin, tools, etc., ore on the dumps, he would pay off the debts and give me three months' time and if any ore was sold in the meantime he would give me credit. I told him "all right"; and he told me to meet him next day and see what he could do. I saw Swift next day. He said everything was ready. We went into the lawyer's office and sat down. The lawyer finished the papers; read them to me. I signed two papers then, and Swift signed one. Swift took them all and went to the commissioner or notary public. I signed the deed and bill of sale to Swift, and he signed the bond and gave it to me.

This is substantially all the testimony upon both sides with reference to the intention at the time of the execution of the deed and bond.

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If we leave out the testimony of the two parties, Swift and Jaikowski, and take the instruments with the testimony of Hall as to what was said by the parties at the time of their execution, the manner of their execution, with the statement of Jaikowski to Stiner, Wise, Greenhow, and Clohecy, the conclusion is irresistible that the intention of the parties was to make an absolute sale with a bond allowing Jaikowski to repurchase within the time stipulated. The testimony of Swift is strongly corroborated by testimony of Hall and all the witnesses to whom Jaikowski had talked, and also by the affidavit made by Jaikowski before Greenhow, notary public, as well as the character of the instruments themselves. On the other hand, the testimony of Jaikowski with reference to the intention of the parties is not at all corroborated by any of the circumstances nor any witness. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition respecting a mortgage; all the conversation between Jaikowski and Swift and other parties was in reference to bargain and sale. During the summer before, Jaikowski, with those whom he had employed to assist him, were all the time trying to sell the mine. This deed was not given to secure a pre-existing debt. Swift had no interest in the McCormick & Co. debt, and only a partial interest in the debt to J. O. Swift & Co. These are all given as strong indications of absolute bargain and sale, and not of mortgage. (*Conway v. Alexander, supra.*) When there is no debt and no loan, an agreement to resell will not change an absolute conveyance into a mortgage (*Henley v. Hotaling*, 41 Cal. 25; *Glover v. Payn*, 19 Wend. 521; *Rick v. Doane*, 35 Vt. 125); and other cases cited in 41 Cal. 25. The question as to inadequacy of consideration cuts no figure whatever, as the complaint alleges that the mines at the date of the commencement of the suit, December 3, 1881, were worth \$100,000. It is entirely immaterial what they were then worth. The only proper question would be what were they worth on the 7th of December, 1881—a matter not put in issue by the pleadings.

It is urged by the plaintiff that when the deed and defeasance are executed at the same time, or are agreed upon at the same time, it is a conclusion of law that they constitute a legal mort-



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gage. *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, and *Wilson v. Shoenberger*, 31 Pa. St. 295, are cited to sustain the position. It is clear that when the separate instrument is intended as a defeasance by the parties that this principle is correct. Both the cases cited are cases where the parties both intended the instruments as mortgages, and denominated them as such on the face of the instruments. It is also indicated by the proof that one was a loan of money, and the other a loan of credit upon which to raise money. Neither case is at all like the one at bar, and it is remarkable that they should be quoted as sustaining the principle that a separate agreement for repurchase is by operation of law a mortgage.

Again, it is asserted that at law an absolute deed and separate defeasance or agreement to reconvey, executed at the same time, amount to a mortgage, and a large number of cases are cited. It is only necessary to say that where the parties intended them to be such, and such intention is indicated either on the face of the instrument or by parol testimony, then they are such, and not otherwise, and this only is indicated by the cases cited, beyond question. There is no case that we have yet been able to find which holds that an absolute deed, and a bond to convey the same property when not intended as mortgage, or security for money, as evidenced by the deed or parol testimony, is held by the court to be a mortgage. A large number of cases which were cited by the plaintiff have been examined, and they all tend to the same point, that when the parties intend the instruments as simply a security for money, then they are construed as mortgages by the courts, and this intention of the parties is to be ascertained—*First*, from the instruments themselves; *secondly*, by parol testimony.

The third error assigned is that the promissory note given to McCormick & Co. is usurious and no claim for interest thereon can be collected, as the same was made and delivered in this territory, and not in Utah. The evidence shows that Jaikowski executed a note in blank, and gave Clohecyc a power of attorney, authorizing him to sell or mortgage his interest in the mines to raise money in Salt Lake City, Utah. Clohecyc was the agent of Jaikowski, and executed and delivered the note and trust

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Points decided.

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deed to McCormick & Co., in Utah. They are not usurious, therefore, being in accordance with the laws in force there.

It is therefore concluded by the court that the instrument executed by Jaikowski to Swift, September 7, 1881, is an absolute deed, as the result of a bargain and sale of the property therein described; that the bond given by Swift to Jaikowski, of the same date, is an agreement to convey a portion of the same property upon the payment of a sum of money at a stipulated time, which has not been either paid or tendered, and that they are not, and were not, intended to be a mortgage or security for money.

The judgment of the court below is therefore affirmed.

Prickett and Buck, JJ., concurred.

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(January 26; 1884.)

JONES v. ST. JOHN IRRIGATING COMPANY.

**BILL OF EXCEPTIONS—EX PARTE MOTION TO STRIKE.**—A bill of exceptions may not be stricken out of the transcript upon appeal upon the ground that the same was not served upon the adverse party prior to settlement.

**PRESUMPTIONS.**—The presumption is that the district court acted regularly in settling a bill of exceptions.

**OVERCOMING PRESUMPTIONS—EVIDENCE—MOTION TO STRIKE.**—To overcome the presumption of regularity in the action of the trial court in settling a bill of exceptions by showing that the bill was settled without having been served upon the adverse party, proof of the failure of such service must be made, upon due notice to the adverse party.

**SERVICE OF NOTICE—ATTORNEYS.**—The affidavit of one attorney to the effect that a bill of exceptions was not served upon the respondent prior to its settlement is not sufficient in a case where the respondent was represented by two attorneys, as in such case the affiant can actually know only of such failure of service upon himself, and can only entertain a belief as to service upon his co-counsel.

**MOTION to strike bill of exceptions.** Motion disallowed, with leave to renew same upon notice.

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Opinion of the Court—Buck, J.

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Smith & McCollum, for Respondent.

BUCK, J.—This cause came into this court on an appeal from final judgment. The respondent files exceptions under rule 9 to that portion of the transcript designated bill of exceptions, and sets forth as the grounds of his exception:

“That the said bill of exceptions was never served on the respondent or his attorneys, nor was any opportunity afforded to respondent or his attorneys to prepare amendments thereto, and because the respondent and his attorneys were kept entirely ignorant of the existence of said bill until the transcript on file was examined by respondent’s attorneys.”

These exceptions are supported by the affidavit of one of the attorneys for respondent in the court below.

An inspection of the record shows a substantial compliance with the statute in the preparation of the transcript. The bill of exceptions appears therein allowed and properly certified by the judge who tried the case in the court below.

It is apparent from the inspection of the transcript that all the grounds of appeal relied upon by the appellant are contained in the bill of exceptions, and to eliminate said bill from the record would practically decide the case against the appellant.

The allowing of the exceptions filed therefore involves and practically passes upon the substantial rights of the appellant, and the court is of the opinion that they should not be allowed without notice to the opposite party. The brief of the appellant is on file, and the presumption is that the court below acted regularly in allowing and certifying the bill of exceptions.

This presumption may be overcome by evidence, but to allow this to be done, *ex parte* and without notice, would be committing in this court the same error complained of in the court below.

The affidavit filed in support of the exceptions does not seem to be sufficient to place the correctness of the exceptions beyond a doubt even could we consider them in this instance. It appears from an inspection of the record that there are two attorneys in the court below.

We doubt whether in a matter of such importance one attorney is competent to say that no notice of bill of exceptions

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Points decided.

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has been served on his associate. At best it can be with him but a matter of belief. We think that affidavits from each and all those who might have had notice should appear in support of the exceptions to overthrow the presumption of regularity in the court below.

The exceptions are disallowed, with permission to renew the same upon notice to the opposite party.

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(February 20, 1884.)

PEOPLE v. PIERSON.

[3 Pac. 688.]

**CRIMINAL LAW—APPEAL—REVIEWING EVIDENCE.**—On an appeal from the judgment only, the court cannot inquire whether the verdict is supported by the evidence; this can be done only upon an appeal from the order denying a new trial.

**HOMICIDE—EVIDENCE.**—In case of a homicide committed by the defendant where the fatal shot was fired while the deceased was retreating and after all danger from him was over, and while defendant was pursuing him, then the defendant is guilty of murder or manslaughter, as the case may be.

**INSTRUCTION—WITNESSES.**—An instruction as to the credit that should be given to a witness, and one that the same weight should be given to the testimony of defendant when corroborated, as to that of any other witness, invades the province of the jury and is properly refused.

**HOMICIDE—DEFENSE OF WIFE—EVIDENCE OF REPUTATION.**—When the defendant seeks to justify a homicide on the ground that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be the wife of the defendant, and that she kept a house of prostitution, with a view of showing that the deceased was upon the premises for purposes other than felonious, is proper.

**INSTRUCTIONS—MOTIVE.**—An instruction that if the jury believe from the evidence beyond a reasonable doubt that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder, is proper.

**INEXCUSABLE HOMICIDE—PURSUING DECEASED.**—When the deceased was slain while endeavoring to escape from the defendant, and had

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Opinion of the Court—Morgan, C. J.

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succeeded in wholly withdrawing in good faith from the vicinity of the defendant and his house, and all danger to the person of defendant, to his habitation, or anyone residing therein was over, then the killing can neither be justified, excused or mitigated by declarations of defendants, made to another person shortly before the homicide, and evidence thereof was properly refused.

(Syllabus by the court.)

APPEAL from District Court, Alturas County. Affirmed.

• L. Vineyard, for Appellant.

James H. Hawley and T. D. Cahalan, Prosecuting Attorneys for Alturas and Ada Counties, respectively, for the People.

No briefs on file in this case.

MORGAN, C. J.—The defendant, George Pierson, was indicted, tried, and convicted at the October term, A. D. 1882, of the district court for Alturas county, for the murder of John T. Hall, at Vienna, in said county, on the twenty-fifth day of August, 1882. The case is brought to this court by an appeal from the judgment. In the argument of the case considerable time was occupied in the apparent effort to show that the verdict was contrary to the evidence. The court is unable to see any substantial objection to the verdict upon that ground. There is no occasion, however, to consider that branch of the argument. The appeal is taken from the judgment. Subdivision 2, section 465, page 432, of the Revised Laws, provides that the appeal to the supreme court from the district court shall be on questions of law alone. The only method whereby this court can review the evidence for the purpose of determining whether the verdict is sustained thereby, is through an appeal from the order of the court below denying a new trial upon that ground. As no such appeal is taken in the case at bar, we can only review the evidence so far as is necessary to determine the questions of law brought here by the appeal from the judgment.

The bill of exceptions alleges as error the refusal of the court to allow the declarations of the defendant to the deputy sheriff in endeavoring to procure the arrest of deceased for alleged offenses against the wife of defendant, made on the day

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of the homicide, and immediately preceding the same; and the ruling of the court in refusing to instruct the jury, at the request of the defendant, that if the jury believe, from the evidence, that the deceased approached the defendant's dwelling at the time of the fatal affray with the intent of committing a felony upon the person of the defendant, or upon the woman in the dwelling of the defendant, whom he claims as his wife and who claims the protection of the defendant, and an asylum in his house, and that the defendant did the killing in order to prevent such felony, then the killing was justifiable, and the jury should acquit. Also in giving the following instructions, to wit: "If you find from the evidence that the defendant was justified, under the rules of law given above, in firing the first shot, but that, after such shot had been fired by the defendant, the deceased, Hall, retreated, and all danger from him was over, and that, while deceased was still retreating and all danger from him being over, the defendant pursued him and fired upon him, thereby inflicting the mortal wound, then the defendant is guilty." While the law recognizes the right of the husband to protect the person of his wife from assault or personal injury, even to the taking of the life of the assailant, still, before this plea can be invoked, it is incumbent upon the defendant to establish two precedent facts to the satisfaction of the jury, to wit: 1. That the relation of husband and wife actually existed between the defendant and the person against whom the assault was threatened or made; 2. That an assault was actually being made or attempted against the wife of the defendant at the time the homicide was committed, and that, in the judgment of a reasonable person, the killing of the deceased was necessary, at the time, to protect the wife from death or great bodily harm.

The appellant also set out in his brief certain assignments of error in admitting and rejecting testimony on the trial, which do not appear in the bill of exceptions, and therefore cannot be considered.

The defendant urges error in the court refusing to give two instructions, as follows: "When the defendant is a witness in his own behalf, as in this case, his evidence is entitled to the same credit as that of any disinterested witness, provided his

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Opinion of the Court—Morgan, C. J.

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testimony is sustained and corroborated by other credible and unimpeached evidence; and also that the defendant Pierson's testimony was to be weighed like the testimony of other witnesses in the case provided it was corroborated by other unimpeached testimony. In the one case the court is asked to charge the jury as to the credit which they should accord to the witness, and, in the other, as to the weight they should give to certain testimony." Either of these charges, if given, would be an invasion by the court of the especial province of the jury, and they were properly refused.

Defendant also claims error in the admission of evidence of the character of the wife of the defendant, not for the purpose of impeachment, but with a view of showing, on the part of the prosecution, that the deceased was upon the premises of the defendant, at the time of the homicide, for purposes other than felonious. This exception is founded upon an assumption that the woman called Banjo Nell was the wife of defendant. The fact is that whether she was his wife or not was a matter before the jury on the trial. At the time this evidence was objected to the prosecuting attorney stated that he expected to inquire into the pretended marriage, which had been testified to on the defense, and also that he expected to show the character of the alleged wife of the defendant, the house she kept, and the right of deceased to be there. We think for these purposes the evidence was properly admitted. The object of proving marriage on the part of the defense was to allow defendant the protection of the law in defending the sanctity of his house, but proof that his house was a house of prostitution, the sanctity of which had been destroyed by the common and public prostitution of his wife, would be competent evidence to rebut the presumption that the deceased was there with a felonious intent.

Error is claimed in the following instruction: "If the jury believe from the evidence that at the time defendant killed deceased, he (the defendant) was actuated by a desire so to do in revenge for some real or imagined injury the deceased had inflicted upon the wife of the defendant, if she were his wife, and not in the necessary defense of his (the defendant's) own person, or the person of his wife (if she were his wife), then

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Opinion of the Court—Morgan, C. J.

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the defendant is guilty of murder, and the jury should so find." It is difficult to conceive of any substantial objection to this charge. Revenge is defined to be a malicious injury inflicted in return for an injury. The law does not excuse one who kills another for revenge. This instruction is in accordance with law, and properly given.

The remaining exceptions to the instructions involve the same principles which are at issue in the exception to the ruling of the court in rejecting the declarations of defendant at the time he sought the services of Deputy Sheriff Either, a short time prior to the affray, and the conclusion of the court upon that exception will dispose of the entire case. The defendant, by his counsel, at the trial excepted to the ruling of the district court excluding the declarations of the defendant made to the witness Either, deputy sheriff, when applying to such deputy sheriff to arrest Hall, the deceased, for alleged acts and intentions in regard to the woman called Banjo Nell, and her personal security in the house, claimed by the defendant as his own. This application is shown by the testimony of Either to have been made by the defendant on the day of, and but a short time before, the killing. And such refusal is alleged as error.

Declarations of a defendant in his own favor are *prima facie* inadmissible, and if the declarations and statements of the defendant made when trying to procure the arrest of Hall, were admissible at all, it must be on the ground that they were part of the *res gestae*, and as tending to show the condition of the defendant's mind at the time of firing the fatal shot. If defendant had killed Hall with the first shot fired by him at or near the door of the cabin, evidence of his declarations made concerning Hall a few minutes before, accompanying his request to the officer, might have been properly admitted as tending to indicate the state of defendant's mind, for the purpose of enabling the jury to fix the degree of the crime; but the evidence clearly shows that the first shot did not strike the person of Hall, and that the fatal shot was fired by the defendant while Hall was running and endeavoring to escape, and when all appearance of danger, either to the defendant himself, his habitation, or to any person residing or being therein, was past and over, if it had ever existed. There is no disputing the evidence



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Opinion of the Court—Buck, J., Dissenting.

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on this point, for there is no conflict. Under these circumstances, when Hall had succeeded in wholly withdrawing himself from the immediate vicinity of the house, and that so palpably as to manifest his good faith, and to remove any just apprehension of danger from the defendant's mind, there can be nothing to mitigate, excuse, or justify the killing.

The judgment of the court below is therefore affirmed, and the cause remanded to the second district court in and for Alturas county, with directions to fix anew the time for executing its judgment.

Prickett, J., concurred.

BUCK, J., Dissenting.—While I concur in most of the opinion as read by the court, I am compelled to dissent from so much thereof as refers to the refusal of the court to admit the declarations of defendant at the time he called upon the deputy sheriff for protection a short time prior to the homicide. The record shows that defendant did not ask protection for himself, but for his habitation. Under section 25, page 324, of the Revised Laws of Idaho, a person has at least as much and possibly more protection of law in defending his property as he does in the protection of his person. The evidence admitted prior to the offer to prove the declarations referred to, tended to show that the deceased, Hall, had on several occasions prior to the homicide, during the three or four months prior thereto, been in the premises of defendant, overthrown the stove, broken the door, discharged his revolver, and done other acts of violence. One of these occasions had been four or five days prior to the shooting, and the last one on the day of the shooting, but just how long before does not appear. The sheriff or deputy had frequently been to the house to quiet the disturbance, had ejected the deceased, and deceased had violated his promise not to return to the premises. Within a short time before the homicide defendant had returned to his house, or his alleged house, found the stove overthrown, his wife or his alleged wife beaten. Within ten or fifteen minutes prior to the homicide he had sent for a physician, and he himself had gone to the sheriff, Either, and asked protection for his property. The doctor arrived soon after his return. Dr. Paterson

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Opinion of the Court—Buck, J., Dissenting.

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testifies that defendant seemed agitated about something—seemed exercised. This was from three to five minutes prior to the shooting.

Our statutes (page 323, section 17) provide that, to constitute murder in the first degree, there must be deliberation and premeditation. The doctrine of the *res gestae*, as stated by Bishop (Bishop's Criminal Procedure, sec. 1086), is that declarations are competent whenever near enough to the act, either before or after, to be probably prompted by the same motive.

The act of going to the sheriff and seeking protection from an officer of the law would seem to be prompted by the same motive as sending for the physician, and the same alleged motive of committing the homicide; that is, the protection of his property.

The whole transaction occurred within a half hour; and it is claimed that the declarations offered in evidence were not more than ten or fifteen minutes prior to the shooting. The objection to such declarations is that they are self-serving, and may have been made for the occasion. But, in the case at bar, the condition of the house, and the bruising of the wife, or alleged wife, were facts existing outside of the defendant's co-operation. In sending for a physician and in going for a peace officer he acted as any good citizen would act, and it is hard to presume fraud upon a defendant when all his acts may be accounted for in the same manner that we would account for the same acts by any other person. I cannot avoid the conclusion that his going for the sheriff was so connected with the protection of his property as to form a part of the *res gestae*, and the act, with the accompanying declarations, should have been admitted, not to justify the homicide, but as bearing upon the question of deliberation and premeditation necessary to constitute murder in the first degree. (*Mack v. Stone*, 48 Wis. 271, 4 N. W. 449; *State v. Keene*, 50 Mo. 358.)

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Argument for Appellant.

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(February 17, 1885.)

## PEOPLE v. DEWEY.

[6 Pac. 103.]

**RES GESTAE—DECLARATIONS OF DECEASED.**—Declarations of deceased, made half or three-quarters of an hour after an affray (in which deceased was fatally shot) and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest, and when deceased had been for that length of time among his friends, are inadmissible as part of the *res gestae*.

**REASONABLE DOUBT.**—A reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life. The above definition of the term, while not perhaps the best that can be given, has been substantially approved by the courts and is not error.

(Syllabus by the court.)

APPEAL from District Court, Owyhee County. Reversed.

Richard Z. Johnson, for Appellant.

The grounds of this appeal are: Error of the court in permitting the witness Williams, over the objections of defendant, to testify to statements of the deceased, highly criminative of defendant, made to the witness from one-half to three-quarters of an hour after the affray was terminated, and in the absence of the defendant and after defendant had been arrested and taken from the scene of the conflict. (See defendant's bill of exceptions, Transcript, page 155.) These statements were admitted in evidence as part of the *res gestae*. The *res gesta* was the affray and that was fully concluded before the statements were made, long before, and they formed no part of it. The statements admitted in evidence were *merely narrative of a past transaction*. (*People v. Ah Lee*, 60 Cal. 85, 86-92; *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074; *Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48; *Field v. State*, 57 Miss. 474, 34 Am. Rep. 476; *Waldele v. Railway Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *People v. Davis*, 56 N. Y. 96, 102; *Reg. v. Bedingfield*, 14 Cox C. C. 341; S. C., 28 Moak's Eng. 288, 289; 14 Am. Law Rev. 822, 823.) The court erred in giving the fifth instruction of its own motion, when the jury were

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told that a *reasonable doubt* "is such a doubt as a person would be likely to act upon in determining important affairs of life." (Transcript, pp. 161, 162, and p. 22.) This instruction required nothing more, at most, than a mere *preponderance* of evidence, for on such preponderance all men daily act "in determining important affairs of life." (*People v. Ah Sing*, 51 Cal. 372.) Here the instruction was: "His own affairs of the *greatest importance*." *Held, error*, citing *Jane v. Commonwealth*, 2 Met. (Ky.), 30; *State v. Oscar*, 7 Jones (N. C.), 305; *People v. Brannan*, 47 Cal. 96; *State v. Dineen*, 10 Minn. 407; Gilf. ed. 326, 333, 334; *State v. Shettleworth*, 18 Minn. 209, 216; Gilf. ed. 191, 195; 14 Cent. L. J. 447; *Commonwealth v. Webster*, 5 Cush. 319, 320, 52 Am. Dec. 711.

Huston & Gray, for Respondent.

The testimony of the witness Williams as to the statements of deceased in regard to the shooting was properly admitted as a part of the *res gestae*. As to what is properly admitted as evidence under this head, we think an examination of the authorities will show that there is no clear and distinct rule, in admitting or rejecting testimony upon this ground, the court should be governed by the particular circumstances of the case. We would respectfully submit that the true rule is that the court should admit such testimony as will, in its opinion, in view of all the circumstances, tend to the elucidation and establishment of the truth in the case. (1 Bishop's Criminal Practice, secs. 1083-1087; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Wright v. Dee*, 7 Ad. & E. 313.) The second assignment of error is upon the definition given by the court to what constitutes a reasonable doubt upon this point of alleged error. We would refer to the following authorities: 10 Am. Law Rev. 650 et seq., and cases cited; *May v. People*, 60 Ill. 119.

MORGAN, C. J.—The defendant was indicted and tried at the September term of the Owyhee county district court, for the murder of Joseph Koenig. He was convicted of manslaughter. Defendant moved for a new trial; which motion was denied by the court, and defendant appealed from the

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Opinion of the Court—Morgan, C. J.

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judgment, and from the order denying a new trial, and assigned the following as error, viz.: "1. The court erred in permitting the witness Williams, over the objection of defendant, to testify to statements of the deceased, highly criminative of defendant, made to the witness from one-half to three-quarters of an hour after the affray was terminated, and in the absence of the defendant, and after defendant had been arrested and taken from the scene of the conflict." The following cases are relied upon to support the ruling in the case at bar, to wit: *Insurance Co. v. Mosley*, 8 Wall. 397; *Rex v. Foster*, 6 Car. & P. 325; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Thompson v. Trevanion*, Skin. 402.

In the case of *Insurance Co. v. Mosley*, 8 Wall. 397, the deceased had fallen downstairs and received a severe hurt upon his head, from the effects of which he afterward died. The question was as to whether his declarations, made immediately after the hurt was received, as to his bodily pains and injuries, were admissible in evidence. The court said that "what the deceased said as to his pains related to present existing facts at the time they were made." We may say, in passing, that declarations of this character are uniformly held to be proper. The declarations as to how he received the injury were made immediately or very soon after the fall. To sustain the admission of the latter declarations the court cites *Thompson v. Trevanion*, Skin. 402. In the latter case the court allowed what the wife said immediately upon the hurt received, and before she had time to contrive or devise anything for her own advantage, to be given in evidence.

In *Rex v. Foster*, 6 Car. & P. 325, the defendant was indicted for killing the deceased by driving a cab over him. The witness heard the deceased groan, and immediately went to him, and asked him what was the matter. Gurney, B., said that what deceased said at the instant as to the cause of the accident was clearly admissible. Park, J., said it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down.

In the case of *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727, the defendant was charged with killing his wife. It appears that deceased ran upstairs from her own room

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in the night, crying "murder" and bleeding. A person who heard her cries went for a watchman, and, on his return, proceeded to the room where she was. He found her upon the floor, bleeding profusely. She said defendant had stabbed her. The declaration was admitted in evidence. The supreme court of Massachusetts held that the evidence was properly admitted, giving as a reason that the declaration was "of the nature of *res gestae*," and that the time when it was made was so recent after the injury was inflicted as to justify receiving it on that ground.

It will be noticed that in each of these cases the declarations were made by the deceased almost immediately after the injury was received, before the deceased had time to think of or contrive a story, and they were admitted in each case for that reason. We cannot escape the conclusion that there was another reason for the admission of testimony in these cases, although not stated. In each case the defendant and deceased were the only persons present when the injury was inflicted. There was no other eye-witness. The absolute necessity of this testimony to work a conviction of a person believed to be guilty, and the nature of the declarations rendering it almost absolutely certain that the statement was true, must have entered into the consideration. The closing paragraph in the opinion of the court in the case of *Insurance Co. v. Mosley, supra*, indicates this. The court say: "In the ordinary concerns of life no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned." As to the necessity of bringing them in under the head of *res gestae*, the court say "that what was said could not be received as dying declarations, although the person who made them was dead, and hence could not be called as a witness." The reasoning of the court, in brief, is this: These declarations were a part of the *res gestae*. They were undoubtedly true. They were conclusive. They could not be admitted as dying declarations. The case could not be made out without them. Therefore they were properly admitted. If the first proposition is correct, there is no need of the others; and the last-named four propositions furnish no legal reasons for the admission of the testimony.

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In the case at bar, the declarations sworn to by the witness Williams, were made one-half or three-quarters of an hour after the shooting occurred, and the same length of time after the conflict was ended. The deceased had been taken across the street into his own house. Several persons were present, all of them his own friends. Counsel for the people asked witness (Williams) the following questions: "Q. How soon after the shooting was it that you heard him [the deceased] make any statement? A. I could not tell exactly; the time may be half or three-quarters of an hour. Q. Do you know whether King at that time was aware of his condition? A. I cannot tell." Counsel then desired to renew the questions as to what King said as being part of the *res gestae*. To this defendant's counsel objected. Objection was overruled, and defendant by his counsel excepted. The following is the testimony: "Q. Will you state what statements Mr. King made to you in regard to this shooting? A. I asked him which shot struck him, and he told me it was the first shot fired that struck him, just when he was going over the boards in to the brewery. Q. He said that he was struck as he was going over those boards, and that it was the first shot? A. Yes, sir; just as he went over the boards."

To indicate how far these declarations are from the original rule, with reference to matters coming under the head of "*res gestae*," it is only necessary to refer to the definition of the term, which is, the "transaction; thing done; the subject matter"; as when it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestae*, for the purpose of showing its true character. Greenleaf says that the principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. (1 Greenleaf on Evidence, sec. 108.) The general rule is that declarations, to become part of the *res gestae*, must accompany the act which they are supposed to characterize, and so harmonize with them as to constitute one transaction. (*Enos v. Tuttle*, 3 Conn. 250; *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074.) If the decla-

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rations offered in evidence are mere narrative of a past event or occurrence, they are inadmissible. (*Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48; *Denton v. State*, 1 Swan, 279; *State v. Tilly*, 3 Ired. 424.) In *Bland v. State*, 2 Ind. 608, it was held incompetent for the accused to prove a statement made by himself half an hour after the homicide, concerning the circumstances under which it was committed.

The declarations admitted in evidence in the case at bar were a mere narration of a part of the affray which occurred a half or three-quarters of an hour before, after all danger was over, after the occurrence had entirely ceased, while the defendant was under arrest, and when the deceased had been among his friends during the whole time that had elapsed, and had a tendency to fix the responsibility for the affray upon the defendant.

The learned justice, in the case of *Insurance Co. v. Mosley*, *supra*, says: "The tendency of recent adjudications is to extend, rather than narrow, the scope of the doctrine of *res gestae*." We have failed to discover such tendency, after an examination of all the cases within our reach which discuss the principle. If it does exist, it indicates a tendency in the courts to leave the field properly occupied by the judiciary and enter that of the law-making power. This is always a dangerous experiment. If evidence of this character is proper and necessary, it is the duty of the legislature to direct that it be admitted. The rules of evidence have been crystallized from the experience and the best thought of centuries. These rules become clearer, their boundaries better defined, as civilization advances, and as the courts improve in the administration of justice. It is unsafe for the courts to extend or violate them. We think the evidence inadmissible, and that it had a tendency to injure the cause of the defendant.

The second error assigned is the definition given to the term "reasonable doubt" in the fifth instruction given by the court. It is as follows: "A reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life." While the court do not say that this is the best definition that could be given, it is substantially the one that has



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been approved by the courts in a number of cases. (See *Arnold v. State*, 23 Ind. 170; *State v. Nash*, 7 Iowa, 347; *State v. Ostrander*, 18 Iowa, 435, 458.) The following definition has been given with approval: "A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause." (*May v. People*, 60 Ill. 119; *Miller v. People*, 39 Ill. 457.) This definition is no stronger than the one given in the case at bar, as the word "graver" is no stronger than the word "important." The last-named definition is open to the same objection that is urged to the instruction given in this case: it requires such a preponderance of evidence as would convince a reasonable man in the graver transactions of life.

The definition given by Mr. Chief Justice Shaw in the case of *Commonwealth v. Webster*, 5 Cush. 320, 52 Am. Dec. 711, and which the supreme court of California, in the case of *People v. Strong*, 30 Cal. 155, say is probably the best definition ever given to the words "reasonable doubt," is as follows: "The evidence must establish the truth of the fact to a reasonable and moral certainty." The word "moral" in that connection, meaning nothing more than "intellectual" or "mental," is therefore the same as "reasonable." The statement would therefore be: "The evidence must establish the truth of the fact to a reasonable certainty." This is a mere synonym for the term "beyond a reasonable doubt." The learned chief justice goes on to say that it is a certainty that convinces and directs the understanding; satisfies the reason and judgment of those who are bound to act conscientiously upon it. Does not a strong preponderance of evidence convince the understanding, satisfy the reason and the judgment, in many, if not all, the most important affairs of life? The understanding, the reason, and the judgment are substantially synonymous terms in the sense in which they are here used. This discussion simply demonstrates the futility of the efforts to define the term "reasonable doubt." The best efforts in this direction are those which use words most nearly synonymous with the term itself. Perhaps as good a definition as any—possibly the best—would be merely negative in its character, and one

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Points decided.

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most easily understood by the conscientious juror; such as: It is not a mere imaginary doubt, but must be a doubt which fairly arises from the evidence, and compels the conscientious juror to say, "I am not satisfied from the evidence that the defendant is guilty, or that the fact in question is true." We think that the definition given by the court below, being substantially approved by the courts, was not erroneous.

The third assignment of error is: The court erred in striking out the following words in the tenth instruction asked by defendant, to wit, "and pursue his adversary." It is a familiar principle that all instructions must be adapted to and founded upon the evidence in the case on trial. After a careful examination of the evidence in the transcript, and particularly that referred to by the counsel for the defendant upon which this instruction is based, we are unable to say that there is any evidence that the defendant pursued the deceased at all. Defendant himself swears "that after the commencement of the affray" he backed up a little after each shot. There appearing to be no evidence of any pursuit by the defendant, the modification was proper.

Judgment reversed, and cause remanded for new trial.

Buck, J., concurred.

Broderick, J., having tried the case in the court below, gave no opinion.

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(February 17, 1885.)

PEOPLE v. KUOK WAH CHOI.

[6 Pac. 112.]

**CHALLENGING JUROR—PRACTICE—CRIMINAL LAW.**—Under our Criminal Practice Act the method of impaneling a trial jury in a criminal action is different from that of impaneling a trial jury in a civil case under our Code of Civil Procedure. In a criminal action the court may require the parties to exercise all their challenges peremptorily, or for cause, and the juror, if accepted, be sworn to try the cause as each juror appears and before another is called, or may, in its discretion, allow the clerk to draw

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Argument for Respondent.

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from the box twelve names before any challenges are interposed, and after these are examined for cause and passed upon draw others to take the place of those excused and allow the parties to examine and pass upon all thus called before exercising their peremptory challenges, provided that in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted for cause at the time of taking recess or adjournment, and those not excused be sworn to try the cause and thus placed under the control of the court.

**SAME**—The court may, for good cause shown, permit a challenge, either peremptory or for cause, to be taken after a juror is sworn and before the jury is completed.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County. Affirmed.

G. L. Waters, for Appellant.

The court erred in compelling the defendant to exercise his peremptory challenge when the first juror in said case was called and sworn; to the ruling of said court defendant by his counsel then and there excepted. The court erred in not permitting the defendant to exercise his peremptory challenge upon the juror, Henry Swanholm, who was called and sworn in said case. The court erred in refusing to permit the defendant to exercise his peremptory challenge to the juror, J. W. Hodgman, who was peremptorily challenged by defendant when twelve jurors were in the box and while defendant had ten peremptory challenges left him to exercise. (*People v. Scroggins*, 37 Cal. 676; *People v. Jenks*, 24 Cal. 11; *People v. Kohle*, 4 Cal. 198; *People v. Ah You*, 47 Cal. 121.)

Huston & Gray, for Respondent.

The only question raised upon this appeal is as to the manner of impaneling the trial jury. Appellant relies upon section 313 of the Criminal Practice Act, which provides that: "The trial juries for criminal actions shall be formed in the same manner as trial juries in civil actions"; but a reference to the provisions of the Criminal Practice Act and the Code of Civil Procedure in relation to the impaneling of trial juries will show a radical difference, not only as to the manner, the grounds of challenge, the number of challenges, precedence in

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Opinion of the Court.

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challenge, but in many other particulars. Again, if section 313 of the Criminal Practice Act of Idaho was ever susceptible of such a construction as is claimed for it by appellant, we submit that it is done away with by sections 109 and 111 of the Code of Civil Procedure, which distinctly provides a different method of impaneling trial juries in civil and criminal causes. It would seem as though sections 331, 332, 333 and 351 of the Criminal Practice Act were too plain to need construction.

Per CURIAM.—The defendant was tried and convicted at the June term, 1884, in the district court in Alturas county, on a charge of murder in the first degree. He appeals from the judgment, and the order overruling his motion for new trial, and assigns as error the ruling of the court compelling him, in impaneling the trial jury, to exercise his peremptory challenges as the jurors were severally called, and before the whole number of twelve jurors were drawn, as in civil causes. Under the statutes of this territory the method of selecting, drawing, and summoning jurors is the same for both criminal and civil actions. The procuring the attendance of jurors preliminary to the trial is provided for in our Code of Civil Procedure, from sections 73-108, inclusive. Section 109 directs that when an action is called for trial such proceedings shall be had in impaneling a trial jury as are prescribed in said code; and section 111 provides that if the action is a criminal one the jury must be impaneled as provided by the statutes relating thereto. The statutes relating thereto are in the Criminal Practice Act. Sections 109 and 111 of the Code of Civil Procedure, if not contradictory, have at least the tendency to confuse the practice; but the obvious intention of the legislature was to provide different methods of impaneling juries in civil and criminal actions. This method in civil causes is specified in chapter 23 of our Civil Code; and in criminal actions, in the Criminal Practice Act, from sections 318-353, inclusive. Section 313 of the Criminal Practice Act, which provides that the trial juries in criminal actions shall be formed in the same manner as trial juries in civil actions, if it was intended to apply to the impaneling of trial juries

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to that extent, was repealed by section 111 of the Code of Civil Procedure. Section 332 of the Criminal Practice Act provides "that a challenge to an individual juror is either peremptory or for cause." Section 333 provides that either of these challenges must be taken when the juror appears and before he is sworn to try the cause, but the court may for good cause permit either of these challenges to be taken after the juror is sworn, and before the jury is completed. Section 377 of the Criminal Practice Act provides that in all cases, on the trial of an indictment for felony, the jurors sworn shall be kept together until finally discharged from a further consideration of the case. Section 4 of an act amendatory thereto, approved January 22, 1881, of the eleventh session, so far modifies this section as to allow jurors to separate in the discretion of the court in the trial of felonies less than murder.

These sections clearly contemplate that in trials for murder after a juror is called he shall remain under the control of the court until he is rejected as incompetent; or, if accepted, until the termination of the trial. The ordinary import of the language used in these sections would justify the practice of requiring the respective parties to exercise all their challenges, either peremptory or for cause, and, if accepted, that each juror be sworn to try the cause before another is called. This was the method pursued in impaneling the jury in the case at bar, and we think the exception to it is not well taken. This method may be, and often is, so far modified in the discretion of the court as to allow the clerk to draw twelve names from the box before any challenges are interposed, and after these are examined for cause and passed upon, to allow others to be drawn to take the place of those excused, and allowing the defendant to examine and pass upon all those thus called before exercising his peremptory challenges. We see no objection to this method, provided that in case of recess or adjournment the peremptory challenges be exercised or waived upon all those passed for cause, and those accepted be sworn to try the cause and remain under the control of the court.

The reason for this practice may be found in the necessity on the part of the government of securing jury trials as far as possible free from every suspicion of improper influences.

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Opinion of the Court.

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It often occurs that several days are occupied in impaneling a jury in important criminal cases. During this time a portion of the jury having been accepted must either be under the control of the court or allowed to mingle freely with the people in the community in which the court is held, and with those in attendance upon court, generally greatly interested in the cause about to be tried. Jurors are thus subject to various corrupt influences, and often to the necessity of hearing in advance numerous accounts and discussions of the action which they are about to try. The law-making power has attempted to guard against this evil as far as possible by placing the juror, from the time he is accepted by the respective parties and sworn, directly under the control of the court. It is claimed that this practice results in inconvenience to the juror; but mere inconvenience should not weigh against the hazard of corrupt trials. The defendant can suffer no injury by thus exercising his peremptory challenge before the jury is completed, for the statute provides that the court may, for good cause shown, permit a challenge, either peremptory or for cause, to be exercised after the juror is sworn and before the jury is completed. The cases cited in opposition to this construction are founded upon the California statutes, which provide that juries in criminal and civil cases be formed in the same manner. Our statutes provide a different method, and hence the authorities cited do not apply to the case at bar.

The legislature have modified the effect of swearing the juror to try the cause by providing, in section 4 of the act before referred to, that a jury sworn to try an indictment for any offense, except murder, may at any time during the trial, before the submission of the cause, in the discretion of the court, be permitted to separate; but this enactment does not modify the method of impaneling the jury. The appellant also assigns as error the admission of the statement of defendant before the committing magistrate at the time of his preliminary examination. The objection to this evidence was not distinctly made, nor was any exception taken to its admission. It is an established principle in practice that when evidence is admitted under objections, and no exception is taken to the ruling of the court, the objection is waived. (*Turner v. Water Co.*, 25 Cal. 398.)

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Argument for Appellants.

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We are able to find no error in the record, and the judgment is therefore affirmed.

Morgan, C. J., and Buck and Broderick, JJ., concurring.

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(February 17, 1885.)

GUTHRIE v. PHELAN.

[6 Pac. 107.]

**RECORD ON APPEAL FROM JUDGMENT.**—On appeal from a judgment, without a statement, nothing belongs to the record, except the judgment-roll, and no question arising outside the roll can be considered.

**EXCEPTIONS TAKEN AT THE TRIAL.**—Exceptions taken at the trial and settled as provided in sections 405 and 406 of the Civil Practice Act form part of the judgment-roll, and constitute part of the record on appeal from the judgment.

**ISSUES OF LAW AND FACT.**—When there is both a demurrer and answer to the same complaint, raising both an issue of law and fact, the issues of law should be first determined.

**SAME.**—When there are both issues of law and fact and the cause is brought on for trial and a judgment rendered, the presumption will be indulged on appeal that the issue of law was previously disposed of by an order overruling the demurrer.

**EXCEPTIONS DEEMED TO HAVE BEEN TAKEN.**—The exceptions which, by section 403 of the Practice Act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions, and cannot be considered, on appeal, without being incorporated into a bill of exceptions and made a part of the judgment-roll.

(Above syllabus by the court.)

**DEMURRER—WAIVER—PRACTICE ON APPEAL.**—Where defendant demurred to the complaint in the trial court, but afterward waived such demurrer, he cannot have the same considered upon appeal.

**APPEAL** from District Court, Oneida County. Affirmed.

Prickett & Lamb, for Appellants.

On the twenty-seventh day of December, 1882, the defendants, by their attorneys, appeared and demurred to the com-

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Argument for Appellants.

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plaint (see Transcript, p. 43), which demurrer was overruled by the court. On the fourth day of January, 1883, the plaintiffs, without leave of court, filed a paper designated a supplemental complaint, in which it is alleged that the note set out and described in the original complaint "is now past due and is unpaid," and "that one hundred dollars is a reasonable and just fee for the collection of said note." (See Transcript, pp. 12-14.) On the seventeenth day of March, 1883, one of the plaintiffs' attorneys filed with the clerk of the court an affidavit showing that the "amended" complaint was served on defendants' attorneys "through the United States mail" on the twenty-first day of January, 1883, and that no answer or demurrer thereto had been served "on this affiant as attorney of plaintiff," and thereupon the clerk entered the default of the defendants on the seventeenth day of March, 1883. (See Transcript, pp. 36-38.) On the twenty-sixth day of March, 1883, the defendants filed an "amended" demurrer to the plaintiffs' complaint. (See Transcript, p. 43.) May 21st an answer was filed. May 21, 1883, the defendants moved the court to set aside the default entered by the clerk, which motion was, on the next day, overruled by the court; and on the twenty-fifth day of May, 1883, a judgment was rendered against the defendants upon the note only (the account having in the meantime been paid), for \$1,139.50 and costs. (Record, p. 50.) From the judgment so rendered the defendants appealed to this court. (Record, p. 66.) The appellants submit that the complaint does not state facts sufficient to constitute a cause of action, or to support a judgment. Where the complaint shows no cause of action, a judgment by default can no more be taken than it can be over a general demurrer. (*Abbee v. Marr*, 14 Cal. 210.) The so-called supplemental complaint was filed without leave of the court, in violation of the provisions of the Code of Civil Procedure, section 261. The default of the defendants was entered improperly and irregularly, without any authority in the clerk to enter the same. The demurrer to the original complaint was pending. The defendants were not required to answer or demur to the supplemental complaint, because it was filed with-



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out leave of court, and because neither the original nor supplemental complaint, nor both combined, contained facts constituting a cause of action. The action of the clerk in entering the default being void, the judgment entered upon such default is also void. The court below erred in refusing to set aside the default. For these errors, apparent upon the face of the record, we submit that the judgment of the district court should be reversed, with directions to dismiss the action.

Smith & McCollum, for Respondents.

There is but one question to be considered on this appeal; that is, Do the pleadings of plaintiffs show a cause of action? Defendants having fully appeared to the original and supplemental complaint, no question of service or of jurisdiction can be considered here. That defendants did so appear, see notice in Transcript, page 41. This is not an ordinary judgment by default rendered by the clerk in vacation, but is a judgment rendered by the court in term after answer filed and upon the pleadings. This fully appears from the transcript (see Transcript, pp. 45, 50), and the recitation of the premises in the judgment, stating that it is purely by default, does not change this. The objection that the supplemental complaint was not filed in strict accordance with the code, section 262, or that it is not in aid of the original complaint, cannot be raised on appeal on the judgment-roll, and if the defendants appeared to the supplemental complaint, they waived all objections. (*Witmore v. Truslow*, 51 N. Y. 338.) It is perfectly proper to set up rights accruing or acquired after the beginning of the action in an amended or supplemental complaint. (*Smith v. Billet*, 15 Cal. 23; *Tustin v. Faught*, 23 Cal. 242.)

Per CURIAM.—This action was commenced in the court below on the eighteenth day of December, 1882, upon an open account for goods, wares, and merchandise, and also upon a promissory note. At the time of the commencement of the action the promissory note was not due, and did not become due until the first day of January, 1883. When the action was commenced, the plaintiff caused an attachment to be is-

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Opinion of the Court.

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sued, and certain goods of the defendants were levied upon. On the twenty-seventh day of December, 1882, the defendants, by their attorneys, appeared and demurred to the complaint. The record brought here does not notice any rulings or order upon the demurrer. On the fourth day of January, 1883, the plaintiff filed a supplemental complaint, which omitted the first count in the original complaint, and counted alone upon the promissory note. On the twenty-sixth day of March, 1883, the defendants filed a general demurrer to the complaint, which was denominated "Amended Demurrer." The record before us is silent as to the disposition of this demurrer. On the twenty-first day of May, 1883, the defendants filed their answer to the complaint, and on the twenty-fifth day of the same month a judgment was entered against the defendants upon the promissory note. No bill of exceptions was taken, and the cause is here upon the judgment-roll, which is imperfect in almost every part; evidently, it is not a complete transcript of all the proceedings had in the case, and the clerk does not so certify. From an inspection of the record it is impossible to know what proceedings were had in the court below. But the parties, by their counsel, have appeared and argued and submitted certain questions for our determination.

The appellants interpose a demurrer in this court, and thereby question the sufficiency of the complaint to sustain the judgment, and contend for the correctness of their practice. While it is true that in some cases an objection to the sufficiency of the complaint can be raised for the first time in this court, yet it is not a practice that can be commended in causes where all parties appeared and had their day in the trial court. The public has an interest in all litigation, and when the defendant is in court, the time of the court should not be consumed in the trial of a cause where an objection by the defendant would terminate all proceedings, and save to parties and to the public the time and expense of litigation.

The question, however, in this case is not whether the appellants can object to the sufficiency of the complaint for the first time in this court, but whether they could raise their objection by demurrer in the court below, have it disposed of there, waive their right to bring the question here by a bill

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of exceptions, appeal from the judgment, and then interpose another or new demurrer in this court. It will be observed that the "amended" demurrer was filed in the court below after the filing of the supplemental complaint, and that the record brought here fails to disclose any order or decision upon it. The rule is that when there is both a demurrer and answer to the same complaint, raising both an issue of law and fact, the issue of law should be first disposed of. The statute so provides. When there are both issues of law and fact, and the cause is brought on for trial, and the issues of fact are tried and a judgment rendered in the cause, the presumption will be indulged, on appeal, that the issue of law was previously disposed of by an order overruling the demurrer; and in this case the presumption is strengthened by the absence of proof that the record is complete. (*Brooks v. Douglass*, 32 Cal. 208; *Abadie v. Carrillo*, 32 Cal. 172.)

It has been settled by this court that when a party desires to have a decision or order of the district court reviewed by this court, he must except thereto when the ruling or decision is made, and he must also preserve and bring up such exceptions by a bill of exceptions or statement. (*People v. Hunt*, 1 Idaho, 433.) It has also been settled by this court in *Fox v. West*, 1 Idaho, 782, that the exceptions which, by section 403 of the Civil Practice Act the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and cannot be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the judgment-roll.

With these adjudications upon these important questions of practice we are still satisfied. Sections 405 and 406 of the Civil Practice Act provide the modes for preserving exceptions in the cases therein mentioned; and section 653 provides that "on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies." The exceptions which the law deems to have been taken by the defendants to the orders in the court below overruling the demurrers, not having been preserved and brought here for review by a bill

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Opinion of the Court, on Rehearing.

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of exceptions, and assigned as error, these questions are conclusively settled, and cannot now be re-examined upon a new or independent objection raised by demurrer in this court. Final judgment was entered in open court, by an order of the court, and all intendments are in favor of its correct action. Judgment affirmed.

Morgan, C. J., and Broderick and Buck, JJ., concurring.

ON REHEARING.

Per CURIAM.—Since announcing the opinion in this case, the appellants, by their counsel, submitted a petition for a rehearing, and we were referred to additional authorities bearing upon the questions decided. After a further examination, we concede that, independent of the decisions already made, the principal question decided in this case—namely, that the order overruling the demurrer, and the exception thereto, should have been incorporated into a bill of exceptions to be available—would not be entirely free from doubt. The legislature may have intended that on appeal from a judgment everything in a transcript which belongs to or constitutes the judgment-roll should be considered by the appellate court in reviewing the action of the trial court, whether there is a formal bill of exceptions or not; but the statute does not say so. The authorities we find which have interpreted our statute are against the construction contended for by the appellant's counsel. Section 403 of our Civil Code corresponds to section 647 of the California Practice Act. In *Nash v. Harris*, 57 Cal. 242, 243, a construction was given to this section. The court say: "When the motion was argued and decided in the lower court, the attorney of the appellant was present, and reserved no exception to the decision of the court." But, according to section 647 of the Code of Civil Procedure, an appealable order "is deemed to have been excepted to." Yet a party who has excepted to a decision of a court, whether he excepted in person at the time the decision was made, or is deemed in law to have excepted, must, in statutory or reasonable time after his exception, avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge."

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Points decided.

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In this territory the question seems to have just arisen in *Ainslie v. Printing Co.*, 1 Idaho, 641. In this case the court held that the verdict of the jury, although "deemed to have been excepted to," should have been incorporated into a bill of exceptions to make it available as an exception. In *Fox v. West*, 1 Idaho, 782, the question in another form was again raised, considered by the court, and the same conclusion reached as in the former case. This construction does not seem unreasonable. In those cases in which the statute requires the party to except, if he desires the question reviewed, the exception so taken will be unavailable unless incorporated into a bill of exceptions, and thus made a part of the judgment-roll; and we think, in those cases where the statute saves the exception for the party against whom the ruling is made, that unless the ruling and exception are, within the statutory time, preserved by bill of exceptions, the question should thereafter be deemed waived. (See *Grazidal v. Bastanchure*, 47 Cal. 167.) Under this construction of the statute a rule of practice has been established, and in the face of these authorities we do not feel warranted in attempting to change it.

Rehearing denied.

Morgan, C. J., and Broderick and Buck, JJ., concurring.

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(February 17, 1885.)

EDDY v. VAN NESS.

[6 Pac. 115.]

**APPEAL BOND—VOID FOR UNCERTAINTY.**—When two appeals are taken, one from the judgment and the other from an order denying a new trial, and an undertaking is given "on such appeal," the bond is void for uncertainty, and the appeals will be dismissed, because no undertaking was filed in either appeal.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County. Appeal dismissed.

In this case there is nothing in the briefs of either party on the point upon which the cause was dismissed, to wit, want of an undertaking on appeal.

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Opinion of the Court—Morgan, C. J.

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Kingsbury & McGowan and Prickett & Lamb, for Appellants.

F. E. Ensign and J. Brumback, for Respondents.

MORGAN, C. J.—In this case the appellants filed and served notice of appeal, both from the order refusing a new trial and from the judgment. The appeal in this case and the undertaking placed on file are precisely the same as the appeal and undertaking in the case of *Mathison v. Leland*, 1 Idaho, 712. The undertaking recites that the appellants are about to appeal from the judgment made and entered against them, and also from the order denying a new trial, and then undertakes to pay all costs and damages which may be awarded against them on the appeal or dismissal thereof, not exceeding \$300. The court say, in *Mathison v. Leland, supra* "It is evident that such an undertaking covers but one appeal, and it is impossible, upon an inspection of it, to determine to which appeal it applies. This being the case, we must hold that neither the appeal from the judgment nor from the order is well taken." Upon the hearing of the motion to dismiss the appeal in this case, counsel for appellants stated that he had taken means to procure a good undertaking. The court, however, cannot determine in which appeal there is an insufficient undertaking, and in which there is none. The undertaking is therefore void for uncertainty. We think we must hold that there is no undertaking in either. The certificate of the clerk is also defective in not stating that an undertaking in due form was properly filed; and the clerk could not make such certificate, since no undertaking in due form was ever filed.

Appeal dismissed.

Buck and Broderick, JJ., concurred.

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Argument for Appellant.

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(February 21, 1885.)

**CREWS v. BAIRD, SHERIFF.**

[6 Pac. 116.]

**STATEMENT OF CASE—RECORD ON APPEAL.**—A paper inserted in the record denominated a statement, and which does not appear to have been settled and signed by the trial judge, is not part of the judgment-roll, and cannot be considered in this court on appeal.

**PLEADING—ACTION OF DETINUE.**—The complainant in an action of detinue which alleges the wrongful taking of the property in question, the detention, the demand, and damages for wrongful withholding the same, is sufficient.

**APPEAL** from District Court, Nez Perces County. Affirmed.

I. N. Maxwell Prepared Brief for Appellant.

The following are the errors assigned by defendant in his statement on motion for new trial, and are used as the specification of error on this appeal: 1. The verdict is not sustained by the evidence, in that plaintiff admitted notice of the vendor's indebtedness and knowledge of Frank Brothers' judgment against him before the purchase of the property, and made no inquiry as to the effect of his (plaintiff's) purchase upon Stroup's creditors; 2. The verdict is contrary to the evidence, in that the hasty sale of all the vendor's property, followed closely upon the rendition of the verdict against him, is presumptive evidence of fraudulent intent, and when shown that the vendor has full knowledge of the facts, this presumption becomes conclusive; 3. The evidence is insufficient to support the verdict, in that every fact established by plaintiff is a badge of fraud. The court below erred in denying defendant's motion for a new trial. All the affirmative allegations of defendant's answer, charging collusion and fraud between Crews and Stroup to defeat and defraud Frank Brothers in the enforcement and collection of the judgment against Stroup, are fully sustained by the evidence and surrounding circumstances in this case.

The rule, we think, has been long and well settled that the purchaser knowing of the judgment against the vendor, and

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Opinion of the Court.

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who purchases the goods of such vendor with the aim and purpose of assisting in the defeat of the creditor's execution, acquires no title by such a purchase against the judgment creditors of the vendor; it is iniquitous, fraudulent and void, notwithstanding he may give a full price. (Bump on Fraudulent Conveyances, 159; 2 Kent's Commentaries, 12th ed., p. 513; *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *Austin v. Bell*, 20 Johns. 442, 11 Am. Dec. 297; Story's Equity Jurisprudence, 1st ed., sec. 369; Story's Equity Jurisprudence, 1st ed., sec. 160; also *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Harrison v. Trustees of Phillips Academy*, 12 Mass. 456; Freeman on Executions, sec. 136; *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755.)

Ezra Baird, *in propria persona*.

J. W. Poe and W. T. McKern, for Respondent.

No brief filed on part of respondent.

Per CURIAM.—In this case the appellant contends that the verdict of the jury is against the evidence, and we are asked to examine this question. That which purports to be a statement of the evidence and exceptions thereto was not settled and signed by the district judge. That the settling and signing of the statement is mandatory, and its omission fatal, is a proposition that cannot be disputed. Without this authentication the statement cannot be treated as part of the judgment-roll, nor be considered in this court. The only question properly presented for our consideration is whether the complaint is sufficient to support the judgment. We think it is. The complaint alleges the wrongful taking of the property in question, the detention, the demand, and damages for wrongfully withholding the same. We think this sufficient.

Judgment affirmed.

Morgan, C. J., and Broderick and Buck, JJ., concurring.



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Argument for Appellants.

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(February 23, 1885.)

## MILLS v. GLENNON.

[6 Pac. 116.]

**ACTION ON ACCOUNT.**—In an action for a balance of account on a general account for labor done, money paid and goods sold it is not necessary to set forth in the complaint the amount of each separate item.

**SAME.**—The account constitutes but one cause of action and the statement of general balance due is sufficient.

**VOID SALE—MORTGAGED CHATTELS—EVIDENCE—ORAL CONSENT TO SALE.**—Under the statutes of Idaho making the willful sale of property upon which there is a chattel mortgage, without the written consent of the mortgagee, larceny, and declaring the sale void, evidence of an oral consent of the mortgagee to the sale of such property is admissible in evidence to explain the intention of the mortgagor in making such sale.

**SECONDARY EVIDENCE—TRANSCRIPT OF LOST ACCOUNT-BOOK.**—True and correct transcripts or original account-books with *aliunde* as to the items thereof may be admitted in evidence when the original books have been accidentally destroyed by fire.

(Syllabus by the court.)

**APPEAL** from District Court, Boise County. Remanded with instructions to modify judgment.

George Ainslie and James H. Hawley, for Appellants.

The court erred in overruling defendants' demurrer to the complaint. The common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each cause. (*Buckingham v. Waters*, 14 Cal. 147; *McCarty v. San Francisco etc. R. R. Co.*, 41 Cal. 17; *White v. Cox*, 46 Cal. 169.) A complaint for money had and received which fails to allege a demand is bad on demurrer. (*Greenfield v. Steamer Grinnell*, 6 Cal. 68.) The court erred in admitting in evidence plaintiff's books of account. To be admissible, they must be the original books and not copies, and the entries must have been made contemporaneous with the delivery of the goods, and by the person whose duty it was to make them. (1 Greenleaf on Evidence, p. 173, and following sections 117-120, and notes 4 on pp. 173 and 174, and 1

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Argument for Respondents.

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and 1, pp. 174 and 175; also pp. 176 and 177.) Where a chattel mortgage is given on personal property, the legal title to the property vests in the mortgagee, and no sale of such property by the mortgagor is valid unless the mortgagee consents in writing to such sale, and the admission of verbal consents by one of the mortgagees is contrary to law. (Idaho Gen. Laws, 11th Sess., 1880-81, p. 307, title, "Chattel Mortgages," sec. 8; Jones on Chattel Mortgages, secs. 426, 699, 700.) And the mortgagee may maintain trespass or trover for the goods against anyone who takes or converts them, etc., even against the mortgagor himself after a forfeiture. (Jones on Chattel Mortgages, secs. 442, 444, 446-448, 706; *Heyland v. Badger*, 35 Cal. 404; *Wright v. Ross*, 36 Cal. 414.) And in a proceeding to foreclose, the mortgage lien will be enforced against those holding under the mortgagor with record notice. (*Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; Jones on Chattel Mortgages, secs. 454, 460, 466, 484.) Parol evidence is inadmissible if it contradicts the terms of the mortgage. (*Jungeman v. Bovee*, 19 Cal. 355; *Bowman v. Ainslie*, 1 Idaho, 644; *Vincent v. Larson*, 1 Idaho, 241.)

Huston & Gray and Prickett, for Respondents.

The books of account were properly admitted; it was the best evidence, and was explained by the testimony. (*Severance v. Lombardo*, 17 Cal. 57.) All the acts of the mortgagor in relation to the sale were within his knowledge, and were, and still are, acquiesced in by him. The vendee has been in no way damnified. His title to the property in his possession, nor his right to possession have never been questioned. Where, then, we ask, is the ground upon which he asks to have the sale invalidated? Why, simply that the consent of the mortgagee to the sale was not in writing. We cite the following authorities in support of our position: Jones on Chattel Mortgages, secs. 456, 457, 660, 661; *Pratt v. Maynard*, 116 Mass. 388; *Stafford v. Whitcomb*, 8 Allen, 518; *Gage v. Whittier*, 17 N. H. 312; *Patrick v. Miserve*, 18 N. H. 300; *Brandt v. Daniels*, 45 Ill. 453. Although a sale of the mortgaged property by the mortgagor without the consent in writing of the mortgagee be prohibited

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Opinion of the Court—Buck, J.

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by statute. (Jones on Mortgages, sec. 486; *Gage v. Whittier*, 17 N. H. 312; *Roberts v. Crawford*, 54 N. H. 532.) The authority in the mortgagor may be inferred. Such authority depends upon the intent of the parties. (Jones on Chattel Mortgages, sec. 457.) The sale of the mortgaged property by the mortgagor with the mortgagee's consent discharges the mortgage lien thereon. (Jones on Chattel Mortgages, sec. 661; *Conkling v. Shelley*, 28 N. Y. 360, 84 Am. Dec. 348; *Brandt v. Daniels*, 45 Ill. 453; Jones on Chattel Mortgages, sec. 465.)

BUCK, J.—This action sets forth in the complaint two causes of action: 1. A balance on account; and 2. Damages for breach of contract. It was tried by the court at the August term of the district court, 1884. Judgment was rendered for the plaintiff for the sum of \$1,638.79. The defendants made a motion for a new trial, which was overruled; and from the order overruling the same, and from the judgment, take this appeal, and bring the cause to this court upon a statement of the case.

The first assignment of error is that the court erred in overruling the demurrer to the complaint. The demurrer is both general and special, but the attorney urged upon the argument but one objection, namely, that in the first count in the complaint several causes of action are improperly united, and that the same is ambiguous and uncertain, and mixed together without any statement or averment of the amount claimed to be due on each one separately. That portion of the complaint objected to for these reasons is as follows: "That the said defendants are indebted to the said plaintiff in the sum of \$420.11, for balance of account for money loaned, services performed by plaintiff for defendants, for grain and various articles of farm produce, and for money paid for defendants' use—the whole done, furnished, and performed at the request of the defendants between January 1, 1881, and April 1, 1884; that the whole aggregate value of which items is the sum of \$1,043.73, no part of which has been paid, except \$623.65, the said balance of \$420.11 still being unpaid." The objection to this pleading set out in appellants' brief and urged in the argument, is "that the common counts cannot all be united in one count as one cause of action without any specification of the

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sums due upon each cause.” Section 231 of the Code of Civil Procedure provides that several causes of action may be united in the same complaint, in several instances specified therein. Among these are causes arising upon contract, express or implied; but the several causes must be separately stated. The allegation objected to set out a balance of account, specifying, by brief mention, the character of the different items composing the account. Section 251 of our code provides as follows: “It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.” This provision was evidently intended to relieve the pleader from the necessity of specifying the exact amount of each separate item, and amply protects the adverse party from surprise at the trial. The *gravamen* of the allegation is the failure of the defendants to pay the balance alleged to be due on the account. We think it constitutes but one cause of action, and was well pleaded. (1 *Estee on Pleading and Practice*, 1st ed., 374, note 5, and cases cited; *Guernsey v. Carver*, 8 Wend. 493, 24 Am. Dec. 60, and note; *Stevens v. Lockwood*, 13 Wend. 645, 28 Am. Dec. 492, and note.)

The objection to the second count of the complaint was waived on the argument. The assignment of errors brings up two important questions of evidence. The first is an exception to the ruling of the court in admitting oral evidence of the consent of the mortgagee of a chattel mortgage to the transfer of the mortgaged property by the mortgagor. General Laws of Idaho, eleventh session, 1880-81, page 307, title “Chattel Mortgages,” is as follows: “If the mortgagor of any property mortgaged in pursuance of the provisions of this act shall, while such mortgage remains unsatisfied in whole or in part, willfully remove from the county or counties where the mortgage is recorded, destroy, conceal, or sell, or in any manner dispose of the property mortgaged or any part thereof, without the written consent of the owner of such mortgage, he shall be deemed guilty of larceny, and upon conviction shall be

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Opinion of the Court—Buck, J.

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punished accordingly, and any such sale or transfer shall be void."

It is claimed by the appellants that under this enactment, under no circumstances, can oral evidence be admitted to justify a sale of mortgaged property, and that every such sale without the written consent of the mortgagee is void. A critical examination of the law will, we think, lead to a different conclusion. It is not every sale that becomes void. To thus avoid a sale it must be willfully done. In law "willfully" has a well-defined signification. Bouvier says it has been decided that "maliciously" is its equivalent. This term implies not merely voluntarily or intentionally, but "legal malice"; an evil intent without "justifiable excuse," with "a bad purpose," "corruptly."

The evident intent of the legislature in this enactment is to protect the mortgagee against the transfer of the mortgaged property with the corrupt purpose of destroying his security. When such a transfer is made he may disregard the transaction as void and take possession of the property. In the case at bar the validity of the sale is called in question by the vendee as against the vendor. The mortgagees are not objecting to it. The evidence objected to is as to the oral consent of the mortgagees to the transfer. In this instance there were two mortgagees. If the oral consent of one or both of these were given to the sale, it would be competent evidence to show the motive of the mortgagor in making the sale. It is claimed that the interests of the mortgagees were entirely distinct, and that one had no right to consent for the other. This might be true and yet the mortgagor might have supposed that one was authorized to speak for both; and under such supposition, honestly entertained, he could hardly be charged with a bad intent. We think this evidence was properly admitted. (Jones on Chattel Mortgages, secs. 455-465; *Stafford v. Whitcomb*, 8 Allen, 518; *Gage v. Whittier*, 17 N. H. 312.)

The second objection to the evidence is to the ruling of the court admitting plaintiffs' books of accounts. The plaintiff testified that his original books of account had been consumed in a fire that destroyed his house; that the book presented contained a copy of the original entries transferred by himself,

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sometimes once a week and sometimes once a month. No objection was urged upon the trial or in the argument as to the admission of the original books, had they been in existence. The only point raised and argued was as to the competency of this evidence; the original having been burned, and the book presented being a true copy thereof. No authorities were cited upon the briefs, nor in the oral argument of counsel. We find, however, in 4 Mass. 455, Sewall, J., lays down the following proposition in the case of *Prince v. Smith*, in which the original books had been burned: "If the proof in this case had tended to show that the items of this account had actually existed in the original books, and the transcript offered had been truly taken therefrom, I should have no doubt of the admissibility of a transcript, thus compared and proved, upon the ground of necessity, and that it was the best evidence which the case admitted, under all the circumstances." In the cases cited, these preliminary proofs were not given, and the ruling of the court in admitting the books was, for that reason, reversed. In the case at bar, these preliminary conditions being conceded, and the only point made being as to whether copies thereof could ever be admitted, we see no error in the court, under the authority cited, in admitting them.

A careful analysis of the evidence, however, shows that there were no items disputed in the account of plaintiff upon which evidence was not given, for and against, by living witnesses at the trial. Indeed, the record does not show that the account-book of plaintiff was in fact ever actually admitted. On the contrary, an inspection of the records indicates that it was used by the plaintiff as a memorandum from which to refresh his memory, and the disputed items seem to have been supported by evidence of witnesses at the trial. It is stated in *Baird v. Hooker*, 8 Ill. App. 306, "that where books of account are improperly admitted at a trial it is not such error as will reverse, if the facts have been proved by evidence *aliunde*."

We see no error in the admission of evidence which will justify a reversal of the judgment.

The appellants assign as error the amount of damages allowed, against the findings. An inspection of the evidence shows that twenty-two thousand nine hundred and fifty-one

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Argument for Appellants.

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pounds of the grain in question were actually turned over by defendants to the mortgagors, Danski and Haug, and at the time of the trial was held by them under the mortgage. The contract price, therefore, was two and one-half cents per pound. The account of defendants for hauling said grain from Garden Valley to Idaho City was one cent per pound, as testified to by defendants, and undisputed by plaintiff. We think the judgment should be modified by deducting from the amount thereof the value of said grain and freight, amounting to \$802.88.

The cause is remanded, and the court directed to modify the judgment in accordance with this opinion; costs of appeal to be equally divided between parties.

Morgan, C. J., and Broderick, J., concurring.

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(February 25, 1885.)

GUTHRIE v. FISHER.

[6 Pac. 111.]

**SURETIES—UNDERTAKING FOR RELEASE OF ATTACHMENT.**—Sureties on an undertaking given for the release of attached property cannot go behind the judgment to set any matter of defense to their liability which might have been pleaded in the original action.

**ANSWER—STRIKING FROM FILES.**—Where an answer is irrelevant it may, on motion, be ordered stricken from the files.

**DEMURRER—RENEWING ON APPEAL.**—Where a general demurrer is interposed in the trial court questioning the sufficiency of the complaint and the demurrer is overruled, and the ruling is not saved by bill of exceptions, such question is deemed adjudicated and the same objection to the complaint cannot be renewed in the supreme court.

(Syllabus by the court.)

**APPEAL** from District Court, Oneida County. Affirmed.

Prickett & Lamb, for Appellants.

A demand of the specific thing agreed to be performed by the covenant must be alleged and proved, otherwise no cause of action is stated. (*Nelson v. Bostwick*, 5 Hill, 37, 40 Am.

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Argument for Respondent.

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Dec. 310.) Sureties to an instrument cannot be charged or affected beyond the plain and necessary import of their undertaking; nor can a new term or condition be added to their stipulation. (*Smith v. United States*, 2 Wall. 219; *McClusky v. Cromwell*, 11 N. Y. 598; *Walsh v. Ballie*, 10 Johns. 181; *United States v. Jones*, 8 Pet. 399; *United States v. Boyd*, 15 Pet. 187; *Miller v. Stewart*, 9 Wheat. 702, 703.) If the allegation of the breach vary from the sense and substance of the contract, and be either more limited or larger than the covenant, it will be insufficient. (*Boston v. Spearman*, 9 Ad. & E. 298; 1 Chitty on Pleadings, 344.) Where a bond is conditioned for the performance of one thing or the other, so that the obligor may discharge the obligation by a compliance with one of the alternatives, a breach assigning a nonperformance of one of the alternatives only is bad. (*People v. Tilton*, 13 Wend. 599.) There is no right of action upon an undertaking until after an execution has been issued upon the judgment, and returned unsatisfied in whole or in part. (Code Civ. Proc., sec. 333; *Laforge v. Magee*, 6 Cal. 651; *Estee's Pleadings*, p. 526, sec. 1.) That judgment was suspended by the appeal and was not conclusive evidence of a debt due from Phelan & Ferguson to Guthrie, Dooly & Co. (*Knowles v. Inches*, 12 Cal. 212; *Woodbury v. Bowman*, 13 Cal. 635; *People v. Frisbie*, 26 Cal. 139; *Thornton v. Mahoney*, 24 Cal. 584.)

Smith & McCollum, for Respondent.

The judgment in the action in which the bond was given is conclusive on the sureties on an undertaking like this. (See *Riddle v. Baker*, 13 Cal. 295; *Chase v. Bernard*, 29 Cal. 138; *Ellis v. Hull*, 23 Cal. 160; *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647.) The answer of defendants was properly stricken from the files. The attempt to plead a pending appeal in the original case was of no effect, and should have been stricken out. It is needless to say that this was pleading a purely legal conclusion. The facts are that no appeal staying the judgment had been taken.



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Opinion of the Court.

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Per CURIAM.—This action is founded upon an undertaking given in an attachment suit brought by these plaintiffs against Phelan & Ferguson. The undertaking was given for the release from attachment of the property which had been seized by the attachment issued in the case, as the property of said Phelan & Ferguson, to secure the payment of any judgment which might be recovered in the action against them. By the undertaking the defendants promised that, in case the plaintiffs recovered judgment against Phelan & Ferguson in the action, they (Phelan & Ferguson) would, on demand, redeliver the property so released from the attachment to the proper officer, to be applied to the payment of the judgment, and that in default thereof these defendants would, on demand, pay to the plaintiffs the full value of the property released, not exceeding the sum of \$1,150. In the attachment suit judgment was recovered against Phelan & Ferguson on the twenty-fifth day of May, 1883, and remained unsatisfied. This action was commenced on the seventeenth day of April, 1884. A general demurrer to the complaint was interposed in the trial court and overruled.

On the seventh day of June, 1884, the defendants filed an answer which alleged that the action in which the undertaking was given was prematurely brought upon a promissory note not due, and that on the twentieth day of May, 1884, an appeal was duly taken to the supreme court from the judgment of May 25, 1883, and that an undertaking was given on said appeal. On motion of the plaintiffs, the answer was stricken from the files as irrelevant, and the defendants were given one day to answer. On the next day thereafter, defendants declining to answer, a judgment was rendered against them, as demanded by the complaint. To the ruling of the court striking the answer from the files, and also to the entry of the judgment, the defendants excepted, and present these questions by a bill of exceptions for the consideration of this court. We do not think the exceptions well taken.

The answer did not aver that an undertaking had been given to stay the execution of the judgment, nor did it allege any facts that constituted a defense to the action, and we think it was properly stricken from the files. The questions raised by

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Points decided.

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the demurrer in the trial court have been argued here, but the ruling upon the demurrer and the exception thereto are not in form in the record to be reviewed, and by failing to preserve and present the questions in due form, the defendants are deemed to have waived the same, and cannot now by a new demurrer, interposed in this court, be heard to say that the complaint is insufficient. (*Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, ante, p. 95, 6 Pac. 107; *Nash v. Harris*, 57 Cal. 242.)  
Order and judgment affirmed.

Morgan, C. J., and Broderick and Buck, JJ., concurring.

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(February 25, 1885.)

## PEOPLE v. BILES.

[6 Pac. 120.]

**ASSISTANT COUNSEL IN CRIMINAL CAUSES.**—Counsel may be employed to assist the district attorney in the trial of criminal causes, and the statute recognizes his right to appear and take part in the conduct of the case.

**CHARGES GIVEN BY THE COURT.**—If the defendant desires to have the charges given by the court of its own motion reviewed by the appellate court, he must except thereto at the time such charges are given and incorporate the same into a bill of exceptions certified to by the judge.

**VERDICT.**—The verdict of the jury may be corrected in a matter of form by the order of the court, in the presence of the jury, before they are discharged, the jury assenting thereto.

**OMISSION OF THE COURT TO CHARGE.**—If either party desires the court to give other or further instructions, he must prepare the same and present them to the court for approval or rejection.

**MISCONDUCT OF JUROR.**—Where affidavits as to the misconduct of a juror are conflicting, the ruling of the court below denying a new trial will not be disturbed.

**CUMULATIVE EVIDENCE.**—Newly discovered evidence which is merely cumulative is not ground for new trial.

**MISCONDUCT OF COUNSEL.**—Misconduct of counsel in asserting the falsity of the testimony of a witness in the presence of the court, jury, the defendant and his counsel, is not of itself sufficient to entitle the defendant to a new trial.

(Syllabus by the court.)

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Opinion of the Court—Morgan, C. J.

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APPEAL from District Court, Alturas County. Affirmed.

James H. Hawley and E. C. Brearly, for Appellant.

The verdict of a jury will always be set aside, if the court should erroneously instruct the jury in a matter of law, which might have influenced their verdict. (*Bolyss v. Davis*, 1 Pick. 206; *Sate v. Conbie*, 12 Pick. 177; *Boyden v. Morris*, 5 Mass. 365; *Dundey v. Livier*, 5 Mass. 438.) The drunkenness of a juror during the trials, and his sleeping in consequence, was good cause for setting aside the verdict, and the court should have made such an order. (*People v. Gray*, 61 Cal. 164, 41 Am. Rep. 549; *Perry v. Bailey*, 12 Kan. 539; *Kellogg & Reed v. Wilder*, 15 Johns. 455; *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Iowa, 494, 1 Am. Rep. 302; *Wells v. State*, 26 Ohio St. 486; *Madden v. State*, 1 Kan. 340; *Jones v. State*, 13 Tex. 108; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760, and note; *State v. Bullard*, 16 N. H. 139; *Greeg v. McDaniel*, 4 How. 367; *Williams v. Page*, 6 Ark. 535; *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332; *Bryant v. Fowler*, 7 Cow. 362.)

Lyttleton Price, for Respondents.

No brief found on file.

MORGAN, C. J.—The defendant was indicted, tried, and convicted for the crime of assault with intent to murder. Defendant moved for a new trial, which motion was denied by the court, and the defendant appealed, both from the judgment and the order denying a new trial. The opinion states the errors assigned.

The first error assigned is that the court erred in allowing private counsel to assist in prosecuting the defendant. While the statute does not specifically authorize the employment of private counsel to assist in the prosecution of persons charged with crime, section 354 of the Criminal Practice Act distinctly and in terms recognizes the right of private counsel to appear and assist the prosecution. The second clause of said section states: "The district attorney, or other counsel for the people, must open the cause and offer the evidence in support

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of the indictment." The words "or other counsel" evidently mean private counsel; as otherwise there could be no other counsel for the people. Section 356, as amended in eleventh session laws, page 227, still more clearly authorizes the appearance of counsel to assist the prosecution, and his right to assist in the prosecution, as follows: "If the indictment is for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it is for any other offense the court may, in its discretion, restrict the argument to one counsel on each side." This recognizes the right of more than one counsel to appear and assist in the prosecution of any criminal cause, but authorizes the court to restrict the argument, in his discretion, to one counsel on each side, in offenses less than capital, but not in capital cases. These sections are not repealed nor affected by section 6 of the act creating the office of district attorney. The latter section reads: "It shall be the duty of the district attorney to prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county, in which the people, or the territory or county, is interested as a party." It does not say that he shall do so unassisted or alone, but simply means the district attorney shall have the general management and control of all such cases. We see no reason why counsel may not be employed to assist the district attorney in the prosecution of criminal causes. (See *People v. Turcott*, 65 Cal. 126, 3 Pac. 461.)

The second error assigned is: "The court erred in giving the instructions 3, 4, 8, 9, 11, 12, 13, of instructions by the court." All these instructions were given by the court of its own motion. No exception was taken to any of these charges at the time they were given. This the defendant must do at the time the instructions are given, if he desires to have them reviewed in this court. Section 413 of the Revised Laws, reads as follows: "On the trial of an indictment, exceptions may be taken by the defendant to a decision of the court 'in admitting or rejecting testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, or the trial of the issue.'" These exceptions must be taken at the trial.

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Section 419 reads: "A bill containing the exceptions must be settled and signed by the judge." Sections 420 and 421 provide for settlement, signing, and filing the bill of exceptions. Section 422 does not save exceptions given by the court of its own motion, but refers only to instructions that have been presented to the court by either party and either given or refused. That section reads as follows: "When any written charge has been presented, and given or refused, the question or questions presented in such charge need not be excepted to nor embodied in a bill of exceptions; but the written charge itself, with the indorsement showing the action of the court, shall form part of the record, and any error in the decision of the court thereon may be taken advantage of, on appeal, in like manner as if presented in a bill of exceptions." In the case of *Peoples v. Hart*, 44 Cal. 598, the court say, with reference to this section: "It is evident that these provisions refer to the written charges or instructions which either party may present and request to be given, and not to the charge which the court may give upon its own motion." These charges not having been excepted to on the trial, cannot be reviewed in this court. (*Cook v. Territory*, 3 Wyo. 110, 4 Pac. 887.)

The third assignment of error is: That the court erred in receiving the verdict of the jury and allowing said verdict to be amended. The verdict as returned was: "Hailey, Idaho, June 18, 1884. We, the jury in the case of *The People of the United States and the Territory of Idaho v. George Byles*, charged with an assault with intent to kill, find the defendant guilty as charged in the indictment." The word "kill" was changed to "murder" by direction of the court. This was a change in matter of form only, and was proper; the verdict being again read to the jury and assented to by them. (*Bishop's Criminal Procedure*, 1013; *People v. Lee*, 17 Cal. 76.)

The fourth error is that the court erred in neglecting to charge the jury that they might convict the defendant of a lesser offense than the one charged. If the defendant desires the court to give further or other instructions than those given, he must prepare the instruction, and present it to the court for approval or rejection. If he do not do this, the omission

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to charge upon the particular point cannot be assigned for error. (*Douglass v. Geiler*, 32 Kan. 499, 4 Pac. 1039.) We find no evidence having a tendency to show that defendant was guilty of any lesser offense than the one charged. The court was not, therefore, required to charge the jury that they might find him guilty of a lesser offense.

In support of the motion for new trial, appellant alleges the drunkenness of the jurors. This allegation is supported by the affidavits of three persons. The fact of drunkenness is denied by the respondent, and this denial is supported by the positive affidavits of six members of the jury, each of whom state that the juror was not intoxicated; that he discussed the evidence and instructions intelligently; and one of the jurors testifies that the said juror was the last one to agree to the verdict. Where affidavits as to the misconduct of the juror are conflicting, the ruling of the court below will not be disturbed. (*People v. Dye*, 62 Cal. 523.) The newly discovered evidence is merely cumulative, and not ground for new trial.

It is claimed by appellant that defendant should be allowed a new trial on the ground of misconduct of one of the counsel for the prosecution. The case shows that one McDermott testified as a witness for the defense; that upon his coming off the stand the assistant counsel for the prosecution demanded his arrest for corrupt perjury. The court remarked that "the grand jury was in session, and that the district attorney could present the matter to them if he thought proper." Counsel for the defense then objected to anything being said having a tendency to influence the minds of the jury. The assistant counsel continuing to make further remarks with reference to the witness, he was stopped by the court, who remarked: "There had better be nothing more said about this matter now." This occurred in open court, in the presence of the defendant and his counsel, before the argument of the cause to the jury. The remarks of the counsel were not approved by the court. No action was taken thereon, and the argument of the cause followed, when counsel could discuss the credibility of the witness. The charges of the court followed, with the usual charge that the jury were sole judges of the weight to be given to the testimony of any particular witness. The cases

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referred to in support of the position taken by the appellant were cases in which the successful party had talked to jurors, or in their presence, during a recess of the court, when neither the opposite party nor his attorney were present, differing materially in this respect, from the case at bar. While we think the conduct of the assistant counsel was improper and reprehensible, we do not think it sufficient ground for new trial.

The evidence sufficiently shows premeditation and deliberation. The quarrel commenced at a saloon one hundred and fifty to two hundred yards from Uhl's shop, by defendant calling Uhl vulgar names, and the parties left the saloon a few minutes thereafter, and proceeded toward Uhl's shop together, quarreling on the way, and while going toward the shop the defendant threw away a stone, saying "he would get something better," stepped into a saloon, procured a revolver, and put it into his pocket, defendant being angry at the time. They both proceeded to the shop, and Uhl handed the boots he had been repairing to defendant, when the latter abused him again and called him hard names. Uhl then pushed him out of the shop, and while he was thus pushing him backward defendant got hold of his revolver and fired at Uhl; pressing it into Uhl's face, fired two more shots, one of which struck his face, inflicting a flesh wound. They were then parted by persons who had reached them. There was evidence tending to show that Uhl had kicked the defendant either before pushing him backward or while doing so. Procuring the revolver while they were proceeding to the shop, and during the process of the wordy quarrel, indicated a deliberate intention to use it in the manner he did use it in attempting to shoot Uhl. We think the jury were fully warranted in finding premeditation and malice.

Judgment affirmed, with direction to the court below to make such further order as may be necessary to carry the judgment into effect.

Broderick and Buck, JJ., concurred.

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Argument for Respondent.

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(February 27, 1885.)

## SHOUP v. WILLIS.

[6 Pac. 124.]

**TAXES—TAX LEVY.**—Taxes cannot be levied except in the manner and for the purposes designated by law.

**STATUTORY CONSTRUCTION.**—Statutes authorizing the levy of special taxes should not be so construed as to extend their meaning beyond the clear import of the words used.

**RECOVERING BACK ILLEGAL TAX.**—Taxes illegally assessed and paid may always be recovered, if the collector understands from the payor that the taxes are regarded as illegal and that suit will be instituted to recover them.

**PLEADING—SUFFICIENT COMPLAINT.**—The complaint in a suit to recover back an illegal tax paid which avers that the same was paid after notice in writing to the assessor—the defendant—that the tax was illegal and suit would be commenced against him to recover the same, is sufficient.

(Syllabus by the court.)

**APPEAL** from District Court, Custer County. Affirmed.

Prickett & Lamb and Johnson & Onderdonk, for Appellant.

It does not appear from the complaint that the taxes were paid under protest or that the money was not paid voluntarily. The contents, or at least the substance of the notice of protest, should be stated, so the court may determine whether the same is sufficient in law. (Cooley on Taxation, 567, 568; *Meek v. McClure*, 49 Cal. 628.)

Charles A. Wood, for Respondent.

No bill of exceptions having been settled and filed in this case, the order of the court below sustaining the demurrer to defendant's answer cannot be reviewed by the court. (*Fox v. West*, 1 Idaho, 782.) Taxes illegally assessed may always be recovered back if the collector understands from the payor that the tax is regarded as illegal and that suit will be instituted to compel the refunding. (*Erskine v. Van Arsdale*, 15 Wall. 75; *Gray v. Washburn*, 23 Cal. 111; *Bank v. Cholfant*, 51 Cal. 369.) When a protest is relied upon, nothing very formal is requisite. (Cooley on Taxation, 568; *Meek v. McClure*, 49 Cal. 628; *Glass Co. v.*



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*City of Boston*, 4 Met. 181; *Carlton v. Ashburnham*, 102 Mass. 348.)

Per CURIAM.—This action was commenced in December, 1883, to recover certain special taxes, which were alleged to have been levied without authority of law, and to have been paid under protest to the defendant, as tax collector of Custer county. The defendant answered, alleging that the tax was levied by the board of county commissioners of the county of Custer, under the provisions of an act of the legislative assembly of the territory entitled "An act to authorize the county commissioners of Lemhi and Custer counties to issue and negotiate bonds, and for other purposes." The answer further averred that prior to the levy of the tax in question steps had been taken by the commissioners of Custer county to have said bonds engraved and printed in accordance with the provisions of the act, and that certain members of the board had endeavored in good faith to negotiate and sell the same. The answer admitted that the bonds were not negotiated, and hence it follows that at the time of the levy, and up to the time of answering, no portion of the bonds or interest thereon was necessarily to be provided for by taxation. Judgment for plaintiff in trial court, and defendant appealed.

Counsel for appellant contend that the levy was authorized by section 3 of the act mentioned, which is as follows: "For the payment of the interest and principal of said bonds, the boards of county commissioners of the respective counties shall, at the time of the levy of other county taxes, include therein a levy of sufficient tax upon all the taxable property in the county to pay the interest, and such part of the principal, if any, as will, according to the terms thereof, become due during the ensuing year." This section authorized the commissioners to levy sufficient tax to pay the interest accruing on the bonds, and such part of the principal, if any, as would, according to the terms thereof, become due during the then ensuing year. It is a well-settled principle of law that taxes cannot be levied or collected at any other time, or in any manner, nor for any other purpose, than that designed by law. (*Desty on Taxation*, 464.) Applying this rule, we think the levy to provide for the payment of interest or principal of any such bonds before they were issued

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 Points decided.
 

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or negotiated was premature, and cannot be upheld. The act provided that the bonds, when issued, should bear six per cent interest, and should not be negotiated or sold at less than their par or face value. With this limitation on the authority of the commissioners, it was impossible to know that the bonds could be negotiated until the sale was accomplished, and it therefore follows that the levy of the special tax was unauthorized and void. (Desty on Taxation, 102.) Statutes authorizing the levy of special taxes should not be so construed as to extend their meaning beyond the clear import of the language employed.

The second question is whether the plaintiff is in a position to recover the tax so levied and paid by him. In *Erskine v. Van Arsdale*, 15 Wall. 77, the court say: "Taxes illegally assessed and paid may always be recovered back if the collector understands from the payor that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them." We think the allegation in the complaint that before paying said taxes the defendant was notified in writing that the taxes were claimed to be illegal and void, and that suit would be commenced against him to recover the same, is sufficient, and that the complaint, as a whole, supports the judgment. (Cooley on Taxation, 568.)

Judgment affirmed.

Morgan, C. J., and Broderick and Buck, JJ., concurring.

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(March 2, 1885.)

SYNNOTT v. SHAUGHNESSY.

[7 Pac. 82.]

**SALE—AGENCY—FIXED PRICE.**—If A and B own a mine and authorize C to sell it for them, or bring them a purchaser at a fixed price, with the understanding that C is to have all he can get above that price, C may make the best bargain he can with anyone; he may purchase it himself, and is under no obligation to disclose to A and B anything he may have discovered concerning the mine after such arrangement is made.

(Above syllabus by the court.)

**AGENCY—COMMISSION FROM BOTH PARTIES.**—If an agent act openly and with the consent of both owners and purchaser, he may contract for and receive a commission from both.

## Argument for Appellants.

APPEAL from District Court, Alturas County. Affirmed.

Angel & Sullivan and John R. McBride, for Appellants.

It is not sufficient to find upon a probative fact, from which it might be argued that the court below was of a certain opinion as respects one of the ultimate facts. (*Pacific Bridge Co. v. Kirkman*, 54 Cal. 558; *Kahn v. Smelting Co.*, 102 U. S. 641; *Bildell v. Briggs*, 56 Cal. 374; *French v. Edwards*, 21 Wall. 147; *Crews v. Brewer*, 19 Wall. 70; *Marsters v. Lusk*, 61 Cal. 146; *Lang v. Specht*, 62 Cal. 146; *Dunn v. Dunn*, 62 Cal. 176; Hayne on New Trial and Appeal, 727, 732.) "Whenever the interposition of a middleman or go-between is used to effect a contract there brokerage exists." (Wharton on Agency, sec. 697; Story on Agency, secs. 28, 31, 109.) Brokerage is agency. (Wharton on Agency, *supra*; Story on Agency, *supra*; *Brown v. Pforr*, 38 Cal. 550; Paley on Agency, 13; Bouvier's Law Dictionary, tit. "Broker"; Burrill's Law Dictionary, tit. "Broker"; Paley on Agency, by Lloyd, p. 171, note. "An appropriation of the fruits after wrongful act of an agent is a ratification of such act, and makes the party liable to the same extent as if his acts had been expressly authorized." (*Murray v. Beninger*, 3 Keyes, 107; Cro. Eliz. 827; *Craig v. Ward*, 3 Keyes, 387; *Waterman v. Dalley*, 51 N. Y. 341; *Garner v. Mangam*, 93 N. Y. 643; *Lee v. Sandy Hill*, 40 N. Y. 488; Kerr on Fraud and Mistake, 111, 112, 137; 1 Parsons on Contracts, 73; Story on Agency, secs. 308, 452, 456; *Krumm v. Beach*, 96 N. Y. 404, 405.) "When a purchaser enters into any side contract or arrangement with the agent or broker of the seller, unknown to the latter, by which they mutually or either of them procure a benefit to themselves, such an arrangement *per se* renders the sale fraudulent and avoids it at the option of the seller." (Wharton on Agency, secs. 244, 245; Story on Agency, 5th ed., sec. 211, and note 2; *Ballam v. Loomis*, 3 Cent. L. J. 263; Bigelow on Fraud, 227, 228, 229; *Moore v. Mandelbaum*, 8 Mich. 433.) Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal by an agent, any lack of perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal." (Bigelow on Fraud, *supra*; Pomeroy's Equity Jurispru-

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dence, sec. 954, p. 486; *Michaud v. Girod*, 4 How. (U. S.) 503; *Norris & Foltz v. Taylor*, 49 Ill. 17, 95 Am. Dec. 568; *Marye v. Strause*, 2 Morr. Min. Rep. 244; Kerr on Fraud and Mistake, 175, 176, 195.)

Rosborough & Merritt, for Respondent.

The omission of the court to make findings upon immaterial matters was not error. (*Lucas v. San Francisco*, 28 Cal. 591; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124, and note; *Caldwell v. Brooks*, 28 Cal. 151.) A finding of fact by the lower court will not be disturbed by the appellate court, when the evidence was conflicting, or where the conclusion drawn from it is not necessarily erroneous in point of law. (*Lewis v. Covilleland*, 21 Cal. 178.) An appellate court will not set aside the findings and grant a new trial on the ground that the findings are not warranted by the evidence, unless the evidence was such that if the questions were submitted to a jury, the court would set aside the verdict as contrary to evidence. (*Moore v. Murdock*, 26 Cal. 514.) To set aside a contract on the ground of misrepresentation, it must be something material, constituting some motive to the contract, something in regard to which reliance is placed by one party in the other, and by which he is actually misled, not a matter of opinion merely, equally open to the examination of both parties. (*Smith v. Richards*, 13 Pet. 29; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661.)

MORGAN, C. J.—The cause was tried before the court at the June term, 1883, of the district court for Alturas county. Judgment was for the defendant and the complaint dismissed. Plaintiffs moved for a new trial, and the motion was denied. Plaintiffs appeal both from the judgment and from the order denying a new trial.

The case shows that on the fifth day of July, 1881, the plaintiffs were the owners and in the possession of the Eureka mine, situated in Mineral Hill mining district, in Alturas county, in the territory of Idaho. On the said fifth day of July, 1881, the said defendant, by his agent, E. A. Wall, purchased the said mine from the plaintiffs John Synnott and Peter Welch for the sum of \$2,200; that on the same day plaintiffs executed and de-

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livered to the defendant a good and sufficient deed of conveyance. On the twenty-fourth day of May, 1882, the plaintiffs bring this action and ask the court to declare this deed fraudulent, null, and void, and set it aside and put the plaintiffs again in possession of said property. Plaintiffs aver: 1. That on the third day of July, defendant, by his agents and employees, discovered on said Eureka claim a large and valuable vein or body of ore, from eighteen inches to four feet in thickness, extending about seventy feet continuously along said vein, which rendered said claim of great value, to wit, of the value of \$100,000. Defendant denies. 2. Plaintiffs aver that defendant, by his agents, fraudulently and falsely concealed the said vein or ore body from the plaintiffs. Defendant denies. 3. Plaintiffs aver that defendant, by his agents and servants, falsely and fraudulently represented and stated to these plaintiffs that no other ore body, or vein of ore, existed in said mining claim, except such as were found by and known to these plaintiffs, as shown in their own tunnels as aforesaid, when defendant well knew, etc., that said vein did exist. Defendant denies. 4. Plaintiffs aver that said false and fraudulent representations were made by defendant's agents and servants to plaintiffs, to induce them to sell said mining claim at far below its real value, to wit, for the sum of \$2,200; and that said false and fraudulent representations, so made by the agents and servants of defendant, did induce plaintiffs to believe that no such ore body existed, and that said mining claim was not worth more than \$2,200, and that said plaintiffs were thus induced to sell and convey said claim for said last-mentioned sum, when, in fact, said claim was then worth \$100,000. Defendant denies. 5. That immediately prior to the discovery of said ore vein or ore body the said plaintiffs had employed one Harry Porter as agent to find them a purchaser for said mining claim, at the price of \$2,500, and that, relying upon the honesty of said agent, they agreed to give said Porter ten per cent of said purchase price as a compensation. Defendant denies. 6. That while so employed the said Porter first made the discovery of said vein and ore body aforesaid, which was unknown to plaintiffs. Defendant denies. 7. That said Porter concealed the same from plaintiffs, and surreptitiously, fraudulently, and collusively, and

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for the consideration of \$1,000, informed the said defendant of the existence of said large vein or ore body, and undertook and agreed to conceal the same from plaintiffs, and to assist said defendant in the purchase of said Eureka claim at \$2,000 or a price greatly below its real value; that by such fraudulent acts of said Porter, as well as the misrepresentations and concealments, they were induced, etc. Defendant denies. These are all the material issues raised by the pleadings. Upon substantial affirmative proof of all the material averments of fraud on the part of either Wall, the agent of defendant, or on the part of Porter, alleged to be their own agent, plaintiffs claim the right to recover. If they have failed in both, the case fails. The principal errors assigned are: 1. That the court has failed to find on all the material issues; 2. That the findings are not supported by the evidence; 3. That the findings do not support the judgment.

The first two propositions are so interwoven and intimately connected that they will be discussed together. The first material issue is, Did the defendant, by his agents and servants, on or about the third day of July, 1881, or before the sale, find a large and valuable vein or body of ore, from eighteen inches to four feet in thickness, extending about seventy feet continuously along said vein, which rendered the mine of great value? In reply to this, the court, in its finding of fact No. 12, say: "The evidence does not show or tend to show that Wall or Porter, or any other person, had discovered or knew of the existence of any vein or lode of ore in place on the Eureka mining claim, other than such as had been found by and was known to Synnott and Welch (the vendors) in their excavations at any time prior to the sale and execution of the deed." Objection is made to the use of the words, "the evidence does not show or tend to show." The fact that they had discovered the vein or lode of ore in question before the sale must be proven by the evidence. If the evidence does not show it, nor tend to show it, then, so far as the purposes of the trial go, they had not discovered it, nor did they know of its existence. No one would fail to understand fully the meaning of the court, which was that neither Wall nor Porter, nor any other person, knew of the existence of the vein or body of ore described. We think the

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finding substantially met the issue presented. The statement of a fact in language such that men of ordinary knowledge, as well as those learned in law, would understand from it that the fact did or did not exist, would seem to be sufficient. The statement is such that it leads us to the inevitable conclusion that the fact alleged did not exist. (See *People v. Hagar*, 52 Cal. 189; *Coveny v. Hale*, 49 Cal. 552; *Emmal v. Webb*, 36 Cal. 204.) The fact itself, however, is positively stated in the last half of the fifteenth finding, which is as follows: "Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode in said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale." This is a statement of fact, pure and simple, and completely meets the issue tendered. Objection is made to the use of the terms "vein or lode of ore in place" and "vein or lode." The words "vein," "lode," and "ledge" are used as synonymous terms, in the common parlance of miners, in the laws of Congress, and in the decisions of courts in mining states and territories. Section 2320 of the Revised Laws of the United States uses the terms as follows: "Veins or lodes of quartz, or other rock, in place, bearing gold, silver," etc. Section 2322: "Locations made on any vein, lode, or ledge situated on the public domain," etc. Section 2323: "Where a tunnel is run for the development of a vein or lode."

Mr. Justice Miller, of the United States circuit court for the district of Colorado, and Justice Hallett, sitting with him, in the case of *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. No. 13,413, 1 Morr. Min. Rep. 566, 573, clearly define what a vein, lode, or ledge is, as follows: "In general, it may be said a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries in the general mass of the mountains; nor does the fact that it is occasionally found in the general course of this vein or shoot, in pockets deeper down into the earth, or higher up, affect its character as a vein, lode, or ledge." This is a perfect definition of the terms "vein," "lode," and "ledge," as understood in mining countries, and also demonstrates the fact that the terms are synonymous. That the terms "vein" or "ore body," as used in the complaint,

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mean, and were intended by the pleader to mean, the same as if the words "vein or lode of ore," in place of the words "vein or lode," had been used, is abundantly indicated by the words which follow in the complaint, namely, that the defendant, etc., by his agents and employees, had on third day of July, 1881, discovered on said Eureka mining claim, remote from where these plaintiffs had been at work, a large and valuable vein or body of ore, from eighteen inches to four feet in thickness, extending for about seventy feet continuously along said vein.

The context clearly indicates that the pleader intended to allege that defendant had so discovered a vein or lode of ore in place, and did not mean by that pieces of float ore, however large or small they may have been, which had broken loose and become detached from the mother lode, and floated down the hill, which is commonly, indeed, universally, called "float" in the mining regions.

The meaning of the terms as used is further indicated by the allegation which follows, to wit, the existence of which rendered said mine of great value, to wit, of the sum of \$100,000 and upward, of the existence of which said vein or body of ore these plaintiffs were wholly ignorant. The pleader well knew that the discovery of float ore did not render the mine of such great value. The experience of men in mining regions teaches them that the discovery of "float" may lead to the ultimate discovery of a vein or lode of ore in place, which would render the mine valuable. They have also learned by sore experience, and after the expenditure of large sums of money, that it frequently leads to the discovery of nothing of any value.

Further evidence that the pleader considered the words "vein or body of ore" synonymous, and, as used, were intended to mean the same thing, is found in the second clause of the complaint, where the terms are used interchangeably, as they allege that defendant represented that no other ore body or vein of ore existed, and further on in same clause that no such body or vein of ore existed. Further on the pleader again returns to "vein or body of ore," clearly showing that the pleader himself considered the terms synonymous. These findings of fact are, we think, entirely responsive to the issue, and completely evidence?



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negative the allegation. Are these findings supported by the

Porter testifies that on Sunday before the fourth day of July, 1881, he was on the Eureka claim, and was going up the hill on the trail, and picked up a small piece of float, about half as big as a hen's egg, and found three or four more very small pieces. "I made no further search until the 5th of July (which was the day of the sale to Wall). I went up with John Gilman. Did not then find any solid vein where it came from. I followed it up (that is, the float) and found one piece for Colonel Wall about six inches through and eight inches long, about fifty feet from the trail. I did not think it made the claim more valuable to any large extent. If I had, I should have bought it myself, as I was in condition so I could have bought it. That was all the workings, and what was found outside, altogether. There was no concealment of this float at all; it laid right there. I showed that float to John Gilman the same afternoon. I was trying to get him to buy it." This was all the ore found by Wall or Porter, outside the tunnels of the owners, prior to the sale. He says that piece, six by eight, was the largest piece that was found. "It was in open ground, nearly bare, and was in plain sight. These two places where I found this float were about seventy-five feet from the cabin of Synnott and Welch. I think I saw Mr. Welch walking over the same ground where the ore was before the sale."

Colonel Wall testifies: "The only evidence of a vein that I saw at any time previous to the purchase was small fragments of broken ore which may have come from that vein or from any source, nor was there any ore that I saw at any point on the claim that was visible to any person, in place, in the vein or near the vein. In fact, there was no ore discovered in place in the vein at all until after several days' work had been done with a number of men; merely fragments of ore that had been detached from the lode and drifted down the hill. This work was all done after the purchase."

John Gilman swears he saw a few pieces of weather-beaten float; that Porter was with him; picked up a piece and showed him. "There had been no work done there; saw no excavation whatever; saw no vein at all."

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This is substantially all the testimony there is as to defendant, his agent, Wall, or Porter, knowing anything about ore being found before the sale. It is evident it falls far short of sustaining the allegations as to discovering a vein or body of ore, and abundantly supports the findings twelve and fifteen above quoted.

The second material averment is that defendant, by his agents and servants, fraudulently and falsely concealed the said vein or ore body from the plaintiffs. In response to this issue the court finds: "No. 15. No concealment of any material fact concerning said mining claim was ever made by the defendant or by any agent or employee of his. Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode in said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale." This finding is completely responsive to the issue made by the allegation, and is supported by the evidence as already demonstrated, as it needs no argument to show that the defendant or his agents could not conceal a vein or ore body which they had not discovered, and of the existence of which they had no knowledge.

The third averment is that defendant, by his agents and servants, falsely and fraudulently represented to plaintiffs that no other ore body or vein of ore existed in said mining claim, except, etc., when defendant well knew it did so exist. In response the court say: "Finding 14. No false or fraudulent representation concerning the Eureka mining claim was ever made to said vendors, or to anyone else, by the defendant, or by any agent or employee of his." This finding being in response to the averment which assumed that defendant had discovered and knew of the existence of the said vein, which assumption not being supported by the evidence, it follows that this finding is so supported.

The first, second, and third averments having been found against the plaintiffs, the fourth averment is no longer an issue; but it is responded to in the seventeenth finding, which states that Synnott and Welch were not induced to rely upon, and did not rely upon any representation, opinion, or act of the defendant, or of any agent of defendant, concerning said mining claim,

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in selling or disposing of the same, or estimating its value or price.

The fifth averment is that, immediately prior to the discovery of said vein or ore body, plaintiffs had employed one Harry Porter as agent to find them a purchaser for \$2,500; that they would give him ten per cent of that sum as compensation; that he then discovered the ore body; that he agreed to conceal it for \$1,000 from plaintiffs, and did conceal it from them, but showed it to defendant's agent, Wall, and agreed to assist Wall in purchasing the mine for a price greatly below its real value. The court below having found that no such ore body was ever discovered by Porter, Wall, or anyone else, before the sale, and the evidence conclusively showing that such finding was correct, the whole question of discovery, fraudulent concealment, fraudulent representations concerning it, is finally disposed of. It remains to inquire whether Porter's receiving the \$1,000 from Wall, the agent of defendant, in any way affected the validity of the sale.

The character of the arrangement between Porter and the plaintiffs is thus stated by Synnott and Porter in their testimony. Synnott states that he first told Porter that if he would find a purchaser at \$2,500, they would give him ten per cent of the sum. Porter said he was trying to sell the Homestake. When he got through with that he would try to find a purchaser for the Eureka. This was about the 25th of June, 1881. He then comes down to the fifth day of July, 1881, the day on which the sale was made, and narrates the sale and conveyance, as follows: "Wall [agent of defendant] came to us on the fifth day of July and offered us \$2,000 for the mine. After some consideration we agreed to take it, and it was arranged we should go to Bullion after supper and make the deed. Then Gilman came to us and offered us \$1,800 and one-tenth of the mine, or \$2,200 cash. Gilman then told us Porter had made a big find on the Eureka. I said, 'Where?' Gilman said, 'You walk over it'; pointing up the trail. I said I knew better; I did not believe it. In the evening, after supper, we went down to Wall's office. Porter told Wall that Gilman had again been to see them, and offered them \$200 more, and they said they could not

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afford to lose it. Wall then agreed to give us \$2,200. We took it and made the deed."

Synnott then returns to the arrangement with Porter, and says: "It may have been in June we had tried to sell it. The least we ever offered to sell the mine for was \$2,000. Whether that was in May or June I don't know." Q. When and how long was Porter in your employ? A. As I have stated, it was about the 25th of June; it may have been a few days after that that we spoke to Porter; that would be perhaps ten or twelve days until the sale was consummated. Q. Was he in your employ until the sale was made? A. We considered so. The sale was made on the 5th of July. Q. Do you say that he continued in your employment that long? A. I have stated how we employed Porter, and you will have to infer from that. We promised to give Porter ten per cent on \$2,500, and Mr. Porter told us he could not get but \$1,800. We told him the least we could take was \$2,000, and we could not afford to pay him anything out of that. That was the understanding between us until the time of the sale. He was to get nothing out of \$2,000. We could not afford to pay him anything. There was no other arrangement. The next thing we knew was, Porter brought Colonel Wall on the ground on the 5th. We did not consider we owed Porter anything out of the \$2,200. Never offered him anything, as we got the extra \$200 through Gilman. Q. How do you make that out? Who caused you to make the sale? A. I suppose Porter; he made the sale, and we supposed he got the money from Colonel Wall. Q. All that Porter did you considered a gratuity, for which he was entitled to no pay? A. He was entitled to no pay from us."

Porter, in his testimony, states: "Synnott and Welch gave me a sort of verbal bond if I should sell the property at such a figure they would give me a certain amount. The arrangement was that they should give me all over \$2,000 that I could get for the ground. That was in June, 1881; I think about the middle of June. I was to have whatever I could get over \$2,000. I was acquainted with the mine and its workings, and the showing as to ore. I made efforts to sell the mine under this arrangement. Made a sale to Colonel Wall, the agent for Shaughnessy. The deed was made to Shaughnessy, I believe. Colonel Wall

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went to them about it, and bought it from them; made the trade with them. I went and got Colonel Wall to look at the property. I brought the parties together. I had stated the terms upon which the mine could be bought to Colonel Wall. I took Wall to see the property, and told him if he bought the property from them I wanted him to respect my option. He agreed to do it, and agreed to give me \$1,000 for my option, or one-fourth of the mine. Q. State, now, particularly, what was the agreement upon your part and upon the others in regard to that option or verbal bond? A. I was to have all I could get over \$2,000. They wanted to get \$2,000 for the ground. They did not want me to sell the mine at \$2,000 and then give me any ten per cent. They wanted \$2,000, and if they could get that, they were satisfied, and I could have all over. There was no agreement between us that I should have a fixed per cent on a fixed price."

This was all the testimony on the matter of the arrangement between Porter and the plaintiffs. This testimony indicates that there may have been, at one time, an arrangement that Porter was to find a purchaser at \$2,500, and Porter to have ten per cent thereof, although Porter swears positively that there was not. The evidence was conflicting, and the court below finds that there was such an arrangement, and that afterward said arrangement was changed to what was termed a verbal option that Porter was to get the plaintiffs \$2,000, and he to have all he could get over that sum. The precise time at which the first and last of these two arrangements were made is not stated by either Porter or Synnott. Porter testifies that the latter arrangement was made about the 26th of June, and was not changed afterward. Synnott testifies that it might have been May or June. All the talk about this matter occurred before Wall went to look at the mine, and before he had any conference with Porter, as appeared by the evidence. Porter brought the parties, Wall and plaintiffs, together, and they made their own contract; Porter simply having before stated to Wall that their price was \$2,000, and the parties made their own trade. The fact that Wall finally paid them \$200 more than they had agreed to take does not change the relation between Porter and plaintiffs.

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It is laid down as the law that if an agent act openly, and with the consent of both owner and purchaser, he may contract for and receive a commission from both. (*Finerty v. Fritz*, 1 Morr. Min. Rep. 439, and cases cited.) And again, if the extent of the agency be merely to bring the parties together, and does not involve the duty of negotiating for either, the agent is termed a "middleman," and may contract for and receive commissions from both. (*Finerty v. Fritz*, 1 Morr. Min. Rep. 440; *Stewart v. Mather*, 32 Wis. 344; *Shepherd v. Hedden*, 29 N. J. L. 334; *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368.) This is true also if each have agreed to pay the agent a commission, with or without the other's consent, if his duty is simply to bring the parties together. (Whart. Com. Law Ag., sec. 337; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *In re Owens*, 7 Ir. R. Eq. 235; affirmed, 7 Ir. R. Eq. 424.)

It is evident from the testimony of Wall, Porter, and Synnott, all the parties who had anything to do with the sale and conveyance of the mine on the 5th of July, that the trade was made under the last arrangement, as Synnott states that he "did not consider that Porter was to have anything from us; we expected he would get his pay from Wall. We never paid him anything; never offered him anything. Porter never demanded anything from plaintiffs. Wall promised to respect Porter's option. He did so, and paid him the \$1,000 agreed upon." If this arrangement had been reduced to writing, no one would question for a moment the perfect propriety of the arrangement. It would then have been a bond to sell and convey at a fixed price on the part of plaintiffs, and on the part of Porter it would have been an option to purchase at a fixed price. It was precisely what Porter termed it—a verbal option or verbal bond—and, when in writing, a very common method of undertaking to find a purchaser for a mine, or to buy one. Would this option be less proper or less binding upon the parties if verbal instead of in writing? Clearly not. The only danger in such case would be the liability of the vendor to demand more, and the liability of the purchaser to refuse to respect the option, the former of which occurred in this case. What was the obligation of Porter? It was evidently understood by plaintiffs that Porter would get his pay from Wall. He was at per-

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fect liberty to get all he could above \$2,000. He could, with perfect propriety, become the purchaser himself.

This whole subject is discussed clearly and at length in case above cited (*Finerty v. Fritz*). In that case the bond was in writing. The court say: "The bond in question was one of those ordinary titled bonds so extensively employed in the mining regions of this state [Colorado], by means of which those desiring to speculate in mines before purchasing the same outright, procure from the owners an option to buy, on payment of a stipulated price within a fixed period of time; the obligor binds himself to execute a deed to the obligee on performance of the condition. No obligation is executed by the obligee. If the contract proves advantageous to the obligee, he pays the purchase money and receives a deed, otherwise he suffers the time for performance to lapse. . . . The obligee may contract a sale of the property on his own account, and at any price he can obtain." In this case Porter might have purchased the mine openly from Synnott and Welch for himself. The evidence clearly shows that Synnott and Welch fixed the price upon their own knowledge of the mine. They had worked upon it over a year; had run four tunnels in different places where they thought the showing good. They had opportunity to know, and believed they did know, more about the mine than any other person. They had been trying to sell it to different persons for some months, and had failed. The highest offer ever made them was that of Gilman, which was \$2,200, and that was the day of the sale. The same amount was given them by Wall. It is just as apparent that Wall bought on his own judgment. He might have failed to find a vein, as plaintiffs had done. It is reasonable to suppose that Synnott and Welch had seen the same float themselves (except the larger piece), and did not regard it as indicating that the mine was of any more value on account of it. They manifested no interest in it when informed by Gilman. Synnott said he knew better. When Porter accepted the proposition of plaintiffs to sell for \$2,000, with the expressed understanding that he was to have all he could get over that sum, he was then under no obligation to reveal anything he discovered to the plaintiffs. The equities in the case do not seem to be clearly with the plaintiffs, as the

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learned counsel contend. The plaintiffs sold the mine for \$2,200, on the 5th of July. On the 7th, two days after, they knew, as Synnott testifies, that Porter was to get the \$1,000 from Wall. A few days after that the vein was discovered. The plaintiffs were there and knew all these facts. The defendant proceeded with labor and skill for ten months, employing a number of hands, until he has spent \$25,000, including the purchase money. He has sold all the ore taken out by plaintiffs, and all he took out himself in his workings, and realized \$2,700. Plaintiffs then bring suit and ask that defendant be required to account to them for this \$2,700; that they be allowed to return to defendants the \$2,200, and receive a deed for the mine. The cause of justice and good conscience is not apparent.

Judgment affirmed.

Broderick, J., concurred.

BUCK, J., Dissenting.—In the discussion of this question I shall not consider that branch of the case which is founded upon the law which requires the vendee not to mislead the vendor. While I have been unable to find any authorities that hold that the words "ore body" are synonymous with or the equivalent of the words "lode," "vein," or "ledge," and therefore have some doubt as to whether the finding that no lode or vein of ore was known, or had been discovered, is responsive to the allegation that the defendant had discovered a lode or body of ore, yet I desire to pass by that matter, which may, perhaps, be more technical than practical, and consider that portion of the action which has its foundation in the law of agency.

The complaint alleges, among other things, that said Porter (after entering the employment of plaintiffs) surreptitiously, fraudulently, and collusively, for a consideration, to wit, \$1,000, paid to him by the defendant, in violation of his said employment of these plaintiffs, and in fraud of their rights, entered into the employment of the defendant, and undertook and agreed to assist him (the defendant) in obtaining the Eureka mining claims from these plaintiffs, by purchase at a price of \$2,200, or a price greatly below its real value, and that by reason of said



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false, fraudulent, and collusive acts of Porter, and the misrepresentations and concealments of defendant, the plaintiffs were induced to part with the property in question.

I presume it will be admitted that if this allegation is true the plaintiffs are entitled to the relief demanded in the complaint. This seems to me to be the more comprehensive and the most important branch of the case. The large ore body has, in the progress of the trial of the case, as is usual, attracted the most attention; but the gravamen of the action, it seems to me, lies in this charge of betrayed confidence, which may be true, even if, as a matter of fact, no ore vein had ever existed within the mine. This branch of the case makes the relation of Mr. Porter to the plaintiffs and defendant a vital issue. That issue is, Was he an agent of plaintiffs? If not an agent, was he a principal contracting with the plaintiffs for the purchasing the mine? If not an agent of plaintiffs, was he an agent of defendant? If not an agent of defendant, was he a party in interest with the defendant? If not, was he then the agent of both plaintiffs and defendant? And, if so, was he a factor, broker, or middleman? The law of the case is different in the several relations, and cannot be determined until this relation is adjudicated. The plaintiffs have a right to demand a finding of fact determining this matter. I am unable to find such a one in the decision of the case by the court below.

The second alleged finding of facts details a conversation between plaintiffs and Porter, whereby a proposition of employment is tendered by plaintiffs and responded to by Porter, and closes with the finding as a fact "that Porter was not invested with any authority to effectuate a sale or bind the plaintiffs or the title to the mine." The vital question, however—Did he have any authority, and if so, what was it?—is not determined.

The fifth alleged finding of facts states that plaintiffs informed Porter that they would sell the mine at \$2,000, but that out of said sum they could pay no commission; but there is no finding, there or elsewhere, as to whether Porter agreed to act as their agent in selling it at that price, or whether he agreed to buy it.

The findings are so indefinite that different minds arrive at different conclusions as to what was the relation of the parties.

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Again, looking into the evidence for the purpose of ascertaining whether the finding that Porter was not invested with authority to sell or to bind the mine, it seems that all the evidence on that point is directly at variance with the finding. In determining the authority of Porter, on the theory that he was employed by plaintiffs, we must look at what he was employed to do, and not what he did under the employment. Synnott, one of the plaintiffs, testified: "I told Porter if he would sell the Eureka for \$2,500 we would give him ten per cent. Porter replied, if he got through trying to sell the Homestake he would try and sell ours." Again, Synnott says: "I told him I would give ten per cent if he sold the mine," etc. Again, Porter himself says, "Synnott and Welch gave me a sort of verbal bond if I would sell the property," etc. He adds, "I made a sale to Wall." On page 64 of Transcript Porter says, "They told me if I could sell for them and bring them \$2,000, that was all they asked." On page 63 he says: "I had authority to sell the mine from about the middle of June. I made sale of it on the 5th of July." It is claimed that it appears from what he did that he had no authority to sell. But the charge is that he did not do as he had agreed to do, and it would be a dangerous practice, if, on such a charge, we should determine what he was authorized to do by what he actually did. I am unable to see that this finding of fact is supported by the evidence; it seems rather to be directly contrary to the evidence of the contracting parties.

If I understand the opinion of the majority of the court, just read, it is based upon the theory that the findings are sufficient to show that Mr. Porter had a contract or verbal agreement with plaintiffs whereby he had what is sometimes called an option to sell, and that, under said authority, he had a right to sell and to appropriate to himself all that he might get over \$2,000. The words of the parties are that he is to sell. Nothing is said of an option. Porter says that he called it a verbal bond. I am unable so to construe their contract. The stipulation that he was to have all over \$2,000 if he should sell (if such there was) was simply the measure of his compensation. It could not alter his relations to the plaintiffs, or his obligations to them. Assuming the findings to show such a contract, I am unable to see

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that Porter stood in any other relation than agent of plaintiffs. If I understand the nature of the contract, often made by miners, which is referred to as bonding a mine, it is an agreement between two principals, to the effect that one will sell to the other at a stipulated price within a given time. In *Finerty v. Fritz*, 1 Morr. Min. Rep. 439, cited in the opinion of the court, such a contract is held to be a sale. The agreement between plaintiffs was not such a bonding, for Porter himself testifies that, "I never made a bargain to buy the property or an arrangement to buy it." On page 78 of Transcript he says: "They or I could have made a sale at any time." If words are to be interpreted according to their ordinary import, Porter was employed to assist plaintiffs to sell the mine, first, at a compensation of ten per cent on the purchase price, if sold; afterward, desiring to increase his compensation, he told the plaintiffs he could only sell the mine for \$1,800. This was not true. He, in fact, did sell it for \$3,200. He, however, as Synnott testifies, left them with the impression that he could not do better up to the time of the sale. The plaintiffs did, indeed, get \$2,200 in consequence of a third party, Gilman, offering them that amount. By chance, they protected themselves to that amount against the duplicity of their own employee. Through the representation of Porter that he could not sell for more than \$1,800, and being greatly in need of money, the plaintiffs were induced to agree to take \$2,000. This agreement, however, did not relieve Porter of his obligation as an agent to deal honestly with his principals, and give them all the knowledge that he possessed concerning the value of the mine. He testifies that he concealed the find for the reason that had they known of it they would not have sold for that price.

Again, it is claimed that if the findings show employment of Porter by plaintiffs, he was simply a middleman to bring the parties together, and that he could lawfully take pay from either. I understand the authorities to be that, while a middleman may sometimes take pay from both seller and purchaser, he must always deal with the utmost fairness with each. An analysis of the term affords the best explanation of the legal obligations of the parties: a man standing in the middle between two; in the center. "Center" is defined to be a point equally distant

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from the extremities. The middleman must be and remain equally removed in interest from the two for whom he contracts. If he varies from this, even in the estimation of a hair, and gives to one knowledge or advantage which he withholds from the other, he loses his position as a middleman, and in the realm of equity, the law will hold him responsible for the position which he really assumes, rather than that which he advertises to occupy. Can it be said that Mr. Porter stands equidistant between the plaintiffs and defendant, when he testifies that "I did not inform the plaintiffs of the fact of my finding ore? I reported it to Colonel Wall." And, again, "I told Colonel Wall I wanted one-fourth of the mine," and that he actually received \$1,000 in lieu of the quarter interest therein.

In *Walker v. Osgood*, 98 Mass. 351, 93 Am. Dec. 168, and note, Wells, J., says: "Plaintiff's employment as a broker, even if he had no authority to bind his principal, and was intrusted with no discretion in fixing the terms of exchange, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him." To a certain extent, and for certain purposes, by the understanding and usage of business and the nature of his employment, a broker is authorized to act for both parties; but what he does in any relation he does as an indifferent person, and not in the interest of either party. It is claimed on the part of the appellants that there is no finding as to the fraud of defendant or his collusion with Porter.

In *Harris v. Burns*, 51 Cal. 528, the court say if the trial court fail to find on an issue of fraud raised, the judgment will be reversed.

In *Le Clert v. Oullahan*, 52 Cal. 254, the court says: "Upon the issue of fraud thus tendered the findings are entirely silent. The cause is not, therefore, in a condition to be decided." In the case at bar it is claimed that if there is no direct finding as to fraud such probative facts are found as necessarily determine the question of fraud. If this is true, it must be that it does so by alleging all the facts, circumstances, and acts of the parties connected with the transaction, in any way bearing upon the question of fraud. But an analysis of the findings will show that, while they set out as facts the conversation of the

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Points decided.

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parties as to the contract of the parties, the evidence of Porter bearing on this question is entirely omitted. He says: "I did not inform plaintiffs about the finding of the ore, for the reason that I did not think it to be to my interest. I was working for my own interest, and not theirs." Also the evidence of Mr. Synnott: "Porter told us the most he could get was \$1,800. That was the understanding between us until the sale."

If Porter was in the employment of plaintiffs he had no right to work for his own interest and not theirs. If there was fraud, it arose from this very working for his own interest to the injury of his employers; and if defendant was in collusion with this working for his own interest instead of his employers', the fraud attaches to him also. Hence the defect in the findings upon the question of fraud.

In *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568, and reported in 1 Morr. Min. Rep. 383, is a case so nearly like the one at bar that it seems to me to determine this controversy, provided the findings should establish the facts. The principles involved in this case are fully discussed. Whether they do apply, or what principles of law apply to the case at bar, can only be determined when the issues of fact in the case are adjudicated. The question of the agency of Porter, the question of fraud of Porter, and the collusion of the defendant in such fraud, if any existed, are the vital issues upon that branch of the case which I am discussing. I am unable to understand the findings of the court below as determining these issues, and I am therefore obliged to dissent from the opinion of the court as just read.

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(March 2, 1885.)

## SCHENK v. BIRDSEYE.

[6 Pac. 128.]

**ENTRY OF JUDGMENT IN VACATION.**—Under our Civil Practice Act a judgment or order of the district court may be entered in vacation.

**ACTION ON FOREIGN JUDGMENT—SUFFICIENCY OF COMPLAINT.**—A complaint in a suit upon a foreign judgment which alleges that

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Argument for Respondents.

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the defendant had been personally served by summons in the city in which the foreign court is held, that he appeared in the action by counsel, that thereafter judgment was newly given, and that the court rendering the judgment was a court of record, which, under the laws of New York had jurisdiction of the subject matter of the action, is sufficient.

APPEAL from District Court, Lemhi County. Affirmed.

Charles A. Wood, for Appellant.

The names of defendants, John Doe and Richard Roe, are fictitious, and it is nowhere alleged in the complaint that their real names are unknown. (Code of Idaho, sec. 268; *People v. Hemans*, 45 Cal. 692; 1 *Estee on Pleadings*, 147.) In an action upon a joint contract, whenever the court has jurisdiction of the subject matter, service of process upon one of the joint contractors will give the court jurisdiction of the person served, and a court may have jurisdiction of the person of one defendant and not of the others; but it would be impossible for a court to have jurisdiction of the subject matter as to one defendant and not as to the others. The personal service of process in the city of Brooklyn was the only way the said court could acquire jurisdiction of the subject matter of the action. (*Freeman on Judgments*, sec. 120.)

Johnson & Onderdonk, for Respondents.

Where a cause of which the court has jurisdiction is tried at chambers by consent of the parties, the judgment rendered therein is not necessarily void for want of a trial in open court. (*Ex Parte Bennett*, 44 Cal. 84; *Ogburn v. Conner*, 46 Cal. 353, 13 Am. Rep. 213.) This appeal is brought up simply upon the record, or judgment-roll, and all the presumptions are in favor of its correctness. The New York judgment is in the nature of a joint contract, and may be enforced by action thereon against one or all. (*Johnson v. Smith*, 14 Abb. Pr. 421.) A several judgment may be properly rendered whenever a several action can be sustained. (*Harrington v. Higham*, 15 Barb. 33; *Parker v. Jackson*, 16 Barb. 33.) There being no bill of exceptions in this case there is nothing before this court to consider. No alleged error can be considered by this court unless

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Opinion of the Court.

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incorporated into a bill of exceptions, and thus made part of the record. There is no distinction in this respect between exceptions saved by the statute and other exceptions. (*Fox v. West*, 1 Idaho, 782.)

Per CURIAM.—This is an appeal from a judgment entered against the defendant, Joseph W. Birdseye, in Lemhi county, The record brought here shows that the cause was heard and evidence taken in open court, and that, by agreement of parties, the cause was taken under advisement, to be decided in vacation; and that it was so determined, and the findings and judgment signed by the trial judge were filed and entered by the clerk. This is now claimed to be error. We think section 29 of our Civil Practice Act fully authorizes this proceeding. Counsel for appellant contends that the complaint is not sufficient to support the judgment. The action is founded on a judgment recovered against this defendant in the city court of Brooklyn, in the state of New York. As appears from the complaint herein, the judgment sued on was joint as to Birdseye and others, and several or personal as to Birdseye. The complaint alleges that Birdseye had been personally served by summons in the city of Brooklyn, and that he appeared in the action by counsel and that, thereafter, judgment was duly given. It is also alleged that the city court of Brooklyn was a court of record, and that, under the constitution and laws of the state of New York, it had jurisdiction of the subject matter of the action. This seems to us sufficient in this respect; and, as there is no bill of exception or statement, there is no other question for consideration.

Judgment affirmed.

Morgan, C. J., and Broderick and Buck, JJ., concurring.

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Argument for Respondents.

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(March 2, 1885.)

## RIBORADO v. QUANG PANG MINING COMPANY.

[6 Pac. 125.]

**MINES—CUSTOMS AND REGULATIONS OF MINES—PRESUMPTIONS.—**

Miner's customs and regulations once adopted are presumed to be existing and in force until the contrary is proven; and in actions concerning mining claims under section 486 of our Code of Civil Procedure proof thereof must be admitted, and, when not in conflict with the laws of the territory, must govern the decision of the action.

**APPEAL—FINDINGS—REVIEW ON APPEAL.**—On appeal a finding of fact will not be reviewed unless the evidence upon the trial in reference thereto is fully and clearly reported in the record.

**SAME—DISTURBING FINDINGS—IRRELEVANT FINDING.**—If the findings of fact sustained the conclusions of law, the judgment below will not be disturbed on appeal simply for the reason that some of the findings of fact and the conclusions of law are irrelevant.

(Syllabus by the court.)

APPEAL from District Court, Lemhi County. Affirmed.

Charles A. Wood, for Appellants.

The owner of mining ground has a right to prohibit the erection, construction, or maintenance of any cut, ditch, or embankment upon his ground, and to remove the same, or any other obstruction placed or constructed thereon, without this express permission, unless the right is given by some mining custom or regulation. (*Coma v. Freitas*, 42 Cal. 339; *Titcomb v. Kerk*, 51 Cal. 289.) When a right of a party to mining ground or the use of water once attaches, it remains in that party or his assigns, until abandoned, unless destroyed by some law or local custom. As the mining law of a district must not only be established, but in force at the time when its operation is claimed, it is void whenever it falls into disuse or is generally disregarded, and the question whether it is in force at a given time is a matter of evidence to be decided by the jury. (*Harvey v. Ryan*, 42 Cal. 627.)

Huston &amp; Gray, for Respondents.

Upon the proposition of the right to run the ditch across defendants' mining ground, we submit the following authorities:



Rev. Stats., sec. 2339; *Noteware v. Storris*, 1 Mont. 311; Laws Idaho Ter., 9th Sess., p. 70; Laws Idaho Ter., 11th Sess., p. 266; *Cave v. Crafts*, 53 Cal. 135. Plaintiffs have a title to said ditch and water by prescription. (*American Co. v. Bradford*, 27 Cal. 360; *Crandall v. Woods*, 8 Cal. 136; *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Cave v. Crafts*, 53 Cal. 135.) Plaintiffs had a right to appropriate the surplus water. The right of defendants' grantors was fixed by their appropriation. (*Kid v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Smith v. O'Hara*, 43 Cal. 371; *Higgins v. Barker*, 42 Cal. 233; *McKinney v. Smith*, 21 Cal. 233; *Nevada Water Co. v. Powell*, 34 Cal. 109; 91 Am. Dec. 685; *Loddell v. Simpson*, 2 Nev. 277, 90 Am. Dec. 537; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Barno v. Sabron*, 10 Nev. 217.) A new trial will not be granted except upon substantial grounds. (2 Graham and Waterman on New Trials, 48-50.) An erroneous finding upon an immaterial point will not justify granting a new trial. (*Lovell v. Frost*, 44 Cal. 471.) Nor for an error favorable to the defendants. (*Wilkinson v. Parrot*, 32 Cal. 102.) That the judgment is broader than the facts alleged and found will justify is no ground for a new trial. (*Shepard v. McNeil*, 38 Cal. 72; *Moore v. Murdock*, 26 Cal. 534; *Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641.)

BUCK, J.—Appeal from an order overruling motion for a new trial. This is an action for damages by Diego Riborado et al., plaintiffs, against the Quang Pang Mining Company, defendants, for an alleged injury by defendants to the ditch and dam of plaintiffs. The plaintiffs' ditch for about one thousand feet is upon the mining claim of defendants. The plaintiffs' dam or dams, built for the purpose of turning water from Sharkey creek into it, are situated off and outside of the Discovery claim, owned and worked by defendants, upon old diggings, washed out and abandoned. The defendants' claim, known as the "Discovery claim," is the prior location, and the plaintiffs' ditch was dug across it without any express license. It was rather tolerated than permitted by defendants' grantors, with the understanding that defendants should work their claim "just as if no ditch was there." The ditch of plaintiffs was commenced in 1868, and they claimed

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the right to put it across defendants' claim, and maintain it there, by virtue of the following miners' regulation adopted in 1866, to wit: "Each claim shall have the right to drain through any other claim or claims, but shall confine his dumpings to his own ground." The appellants claim that this regulation was void for nonuser. There was no evidence that said regulation had either fallen into disuse or had been superseded by any other. On the contrary, the evidence shows that the mining district is still in existence, and that the two claims in dispute had been worked almost, if not quite, continuously all the time since said ditch was made. If there is any custom or regulation modifying this regulation of 1866, the defendants should have proven it on the trial. (*King v. Edwards*, 4 Morr. Min. Rep. 484.) In the absence of such proof, the written regulation, once established, is presumed still to exist and be in force.

In the assignment of errors it is claimed that the fifth finding is unsupported by the evidence. That finding is as follows: "That in 1879 the defendants washed out what was called the lower dam of plaintiffs, and set fire to and burned the upper dam." The error to this finding is alleged to be that the evidence shows that the plaintiffs' lower dam was washed out in 1878, and never afterward repaired; that the dam burned was the remnant of the old dam; and that there is no evidence of any damage to plaintiffs from said burning. After a careful study of the evidence we are unable to say that there is error in this finding. The evidence brought up is in such a confused condition, abbreviated and often in broken sentences, wanting substantives and predicates, that it is quite impossible to determine as to many matters given in evidence. It is admitted upon the argument that there was a good map of the grounds in dispute in the court below. This map is not here. The locations of these dams were explained to the court below by reference to the map, which is not in the transcript. It is therefore impossible for us to say that the finding was not supported by evidence. To the further objection to this finding, to wit, that there is no evidence of damage from said burning, it is sufficient to say that the evidence of plaintiff sets the damage of 1879 at \$350. This damage resulted from cutting out the dam, and loss of time.

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The second error assigned is that the seventh finding, to wit, that in 1881 defendants washed out plaintiffs' dam and filled plaintiffs' ditch with tailings to such an extent as to ruin their season's work, is contrary to the pleadings and unsupported by evidence. The evidence of plaintiffs upon that subject was: "In 1881 the pole flume so placed filled up the ditch level with sand. They washed away everything. Lost all the summer's water." "The pleadings allege that in 1881 the defendants wrongfully and unlawfully cut and injured the ditch and dam of plaintiffs." We think the finding that defendants washed out the dam and filled up plaintiffs' ditch to such an extent as to prevent their using it for a year is fairly responsive to the allegation that they cut and injured it. The appellants assign as error the conclusion of law that the defendants are liable to plaintiffs for the amount of damages unnecessarily done by them in the years 1879, 1880, and 1881. This finding is general, and sustained by the fifth finding of fact, to wit: That in the year 1879 defendants washed out what was called the lower dam of plaintiffs and set fire to and burned the upper one. Allowing, as was claimed upon the argument, that the evidence shows that the lower dam was washed out in 1878 and never afterward replaced, which does not seem clear to us, yet the burning of the upper dam would be sufficient to sustain the finding. This dam was not on the Discovery claim. It was on ground abandoned and worked out and open to all. There is some pretense that defendants were washing the old tailings, but there is no evidence that they had any claim there that would justify their washing away or destroying plaintiffs' dam.

It is also claimed that the following conclusion of law is erroneous, to wit: The plaintiffs have the right to convey said water over the mining ground of defendants, by ditch and flume, to their mining ground below; subject, however, to the right of defendants to work their mining ground over which said ditch runs, doing no unnecessary damage; subject, also, to the defendants' right to recover damages from plaintiffs for such easement, if any occurred. We think this general proposition of law is clearly sound. The mining regulation quoted above has the force of law, and section 486 of our Code of Civil

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Procedure makes it evidence in actions concerning mining claims. It is claimed that the law as laid down by the court was irrelevant, and not responsive to the findings of fact. Possibly this may be true, yet we can see no injury which its enunciation has done the defendants. Admitting that the sixth and seventh findings do not bring the case within this law, still we are of the opinion that the fifth finding of fact sustains the conclusion of law, and the judgment is therefore affirmed.

Morgan, C. J., and Broderick, J., concurring.

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(January 25, 1886.)

MOTHERWELL v. TAYLOR.

[9 Pac. 417.]

**PRACTICE—VOID UNDERTAKING ON APPEAL.**—When an appeal is taken from the judgment, also from an order refusing a new trial in the same case, and an undertaking given in the sum of three hundred dollars in such an appeal, the bond is void and the appeals should be dismissed.

**SAME—PRESENTING NEW BOND ON APPEAL.**—When an undertaking on an appeal is void, the filing of a new and sufficient undertaking at the hearing of motion to dismiss the appeal will not avail the appellant.

**APPEAL** from District Court, Ada County. Appeal dismissed.

L. Vineyard, for Appellants.

F. E. Ensign, for Respondent.

No briefs on file in this case.

**HAYS, C. J.**—This is a motion by respondent to dismiss the appeal from the order denying motion for a new trial, also from the judgment of the court below, on the ground, among other things, that the undertaking is insufficient and void. The appeal and the undertaking in this case are substantially like those in *Mathison v. Leland*, 1 Idaho, 712; *Eddy*

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*v. Van Ness*, 6 Pac. 115. The appellant seeks in each of these cases to appeal from the order denying a new trial, and from the judgment therein.

The undertaking in this case, among other things, sets out that whereas the plaintiffs appeal to the supreme court of the territory of Idaho from the judgment and decree made and entered against said plaintiffs in said action, etc.; and that the plaintiffs also appeal to said supreme court from the order of said district court overruling plaintiffs' motion for a new trial in said action; and then undertakes to pay all damages awarded against them on appeal, or on a dismissal thereof, not exceeding the sum of \$300. It was held by this court in the case of *Mathison v. Leland*, *supra*, that such an undertaking covers but one appeal, and that it was impossible upon inspection to determine to which appeal it applied, and that neither the appeal from the order or from the judgment was well taken, and therefore the appeal was dismissed. It was held in *Eddy v. Van Ness*, *supra*, that such an undertaking was void, and therefore there was no undertaking in either appeal, and in that case also the appeal was dismissed.

Upon the hearing of motion to dismiss appeal appellants presented to this court two good and sufficient undertakings, approved by a justice of the supreme court, and asked that the same be filed pursuant to section 657 of the code. In the case of *Emery v. Langley*, 1 Idaho, 694, the undertaking was simply insufficient, while in this case, following the former adjudications of this court, the undertaking is void. We are aware the practice has been different in California from what it is in this territory; but, after an examination of the authorities cited, are satisfied that the courts of that state are guided more by precedent than by sound legal principle in this class of cases. It seems from the former adjudications of this court that a distinction has been drawn between the insufficient undertaking and the one that is void. We must therefore hold that the filing of sufficient undertaking at the hearing of motion to dismiss will not avail the appellants.

The appeal is dismissed, without prejudice to another appeal.

Buck and Broderick, JJ., concur.

## Argument for Respondents.

(March 2, 1885.)

## LUFKINS v. COLLINS.

[7 Pac. 95.]

**SALE OF CHATTELS—DELIVERY—THIRD PARTIES.**—When property sold in good faith is at the time in the care and custody of the third person, notice to said person of the said sale is sufficient to constitute a delivery as to subsequent purchasers or attaching creditors.

(Syllabus by the court.)

APPEAL from District Court, Alturas County. Reversed.

Kimball &amp; Heywood, for Appellants.

An erroneous instruction is not cured by another instruction upon the same subject, which is correct, unless the former is specifically withdrawn. (*MacKey v. People*, 2 Colo. 13; *Murray v. Commonwealth*, 79 Pa. St. 311; *Rice v. Olin*, 79 Pa. St. 391; *Toledo etc. R. Co. v. Shuckman*, 50 Ind. 42; Thompson on Charging the Jury, sec. 69; *Harrison v. Spring Valley etc. Co.*, 65 Cal. 376, 4 Pac. 381.) The giving of inconsistent instructions is error, for the reason that the jury will be as likely to follow the one as the other. (*Henschen v. O'Bannon*, 56 Mo. 289, 292; *Pond v. Wyman*, 15 Mo. 175, 181; *Chicago etc. R. Co. v. Payne*, 49 Ill. 499; *Clem v. State*, 31 Ind. 480; *Selin v. Snyder*, 11 Serg. & R. 319; *People v. Campbell*, 30 Cal. 312.)

G. L. Waters, L. Vineyard, F. Ganahl, and Prickett & Lamb, for Respondents.

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterward dispute that fact in an action against the person who has himself assisted in deceiving. (*Anderson v. Armstead*, 69 Ill. 452; *Stewart v. Munford*, 91 Ill. 58; *Mayer v. Erhardt*, 88 Ill. 542; *Nichols v. Pool*, 89 Ill. 491; *Lewis v. Lanphere*, 79 Ill. 187; *Kinnear v. Mackay*, 85 Ill. 96; *Sebright v. Moore*, 33 Mich. 92; *McNeil v. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Moore v. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *McStea v. Matthews*, 50 N. Y.

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166; *Dewey v. Field*, 4 Met. (Mass.) 381, 38 Am. Dec. 376, and note.)

BUCK, J.—This was an action of claim and delivery, tried at the June term of the district court, 1884. The action was brought to recover the possession of six mules, claimed to have been bought by plaintiff of Adams & Cunningham by bill of sale, dated November 22, 1882. The defendants claimed title to the property by virtue of a bill of sale from the same vendors, dated November 21, 1882. At the time the first bill of sale was executed and delivered to defendants, the property was in the care and custody of the plaintiff on the roadbed of the Oregon Short Line Railroad, then being constructed. The bill of sale was made at Pocatello, Idaho, and the property was about fifty miles from there. The six mules were a portion of seventy-one animals, included in the sale to defendants. Lufkins, the plaintiff, was in charge of said animals, as foreman of Adams & Cunningham, the vendors. On the morning of the day succeeding the sale to defendants, Mr. Stevens, one of the firm of Stevens & Collins, and Mr. Adams, one of the vendors, traveling toward the place where the animals were, met the plaintiff, Lufkins, and Mr. Adams informed him (the plaintiff) that they had sold the stock to defendants, and defendant Stevens then and there hired the plaintiff to continue in charge of the stock as the foreman of the defendants. The plaintiff then agreed to accept said employment, and then entered into the services of defendants.

The said stock was scattered along said roadbed some twenty or thirty miles, the principal portion being at the forty-third mile station. During the said twenty-second day of November, the plaintiff Lufkins, and defendant Stevens, with Mr. Adams, traveled over the line to said forty-third mile station, where all the stock was turned over. During the evening, while the stock was coming in, Adams & Cunningham executed to plaintiff the said bill of sale, dated on the 22d, in which they sold all "their right, title, and interest" to the six mules in dispute, the said stock being a part of the seventy-one head enumerated in the bill of sale to defendant made the day before. The plaintiff took possession of said six mules before they had been

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Opinion of the Court—Buck, J.

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turned over to defendants, and defendants afterward took them from plaintiff, and still hold them under claim that the title to the property passed to them, defendants, on the morning of the 22d, when plaintiff, having them in his possession, first received notice of the sale of said stock; the plaintiff, on the contrary, claiming that the title passed to him on obtaining possession of the stock on the evening of the 22d, the defendants having up to that time never had the property in actual possession under said bill of sale.

The court gave the following instruction to the jury on the request of the appellants: "When property sold in good faith is, at the time, in custody of a third person, notice to him of the sale is sufficient to constitute a delivery, as to subsequent purchasers or attaching creditors." This instruction is the law upon that point. (*Benjamin on Sales*, p. 672, sec. 675, note d; *How v. Taylor*, 52 Mo. 592; *Cofield v. Clark*, 2 Colo. 101; *Dempsey v. Gardner*, 127 Mass. 381, 383, 34 Am. Rep. 389.) This court also gave, at the request of respondent, another instruction, in which the following language is used: "But, in order to constitute such delivery, it is necessary that the seller, purchaser, and third party should all agree." To this modification of the former instruction the appellants excepted, and assign the same as error. The modification, being a portion of a long instruction asked for on the trial, probably was given without observing that it was a substantial contradiction of the other instruction. It seems to be unsupported by the authorities, and, being a contradiction in terms as to the law of the case, it falls within the rule that "the giving of inconsistent instructions is error, for the reason that the jury will be as likely to follow the one as the other," and also that "an erroneous instruction is not cured by another instruction upon the same subject which is correct, unless the former is specifically withdrawn." (*Mackey v. People*, 2 Colo. 13; *Rice v. Olin*, 79 Pa. St. 391; *Thompson on Charging the Jury*, sec. 69; *People v. Campbell*, 30 Cal. 312.)

The bill of exceptions contains several exceptions to the ruling of the court in the matter of instructions to the jury, and the admission of evidence, which would be interesting matters of consideration; but the views of the court upon the instruc-



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Argument for Appellant.

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tion already discussed being decisive of the case, the limited time at the disposal of the court will prevent a more extended discussion of them.

Judgment reversed, and new trial granted.

Morgan, C. J., concurs.

BRODERICK, J.—I do not question the law as stated in the syllabus of this case. I think it correct; but I cannot assent to all that is said in the opinion.

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(January 25, 1886.)

JONES v. QUANTRELL

[9 Pac. 418.]

**APPEAL—NOTICE—ADVERSE PARTY.**—One of two defendants appeared generally in the action, the other specially, and moved to quash summons, after which joint judgment was rendered against both of them, and the one who appeared specially appealed. *Held*, that the other defendant was an adverse party to the appeal, and should be served with notice thereof.

**SAME—DISMISSAL OF APPEAL.**—An appeal will be dismissed on motion where all the adverse parties are not served with notice of appeal.

**APPEAL** from District Court, Alturas County. Appeal dismissed.

A. F. Montandon, for Appellant Ward.

The court erred in overruling appellant's motion to quash service of summons on him, and in sustaining respondent's motion to quash appellant's motion, and for this purpose appellant could appear specially. (*Deidesheimer v. Brown*, 8 Cal. 340; *Gray v. Hawes*, 8 Cal. 569; *Lyman v. Milton*, 44 Cal. 631; *Kent v. West*, 50 Cal. 185; *Linden Gravel Min. Co. v. Sheplar*, 53 Cal. 245; *Lindler v. Flemming*, 47 Cal. 614; *Elbridge v. Kay*, 45 Cal. 49; *Lung Chung v. N. P. R. R. Co.* (U. S. Dist. Ct. Or.), 2 West Coast Rep. 88; *Atchison etc. Ry. Co. v. Nichols*

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(Colo.), 6 West Coast Rep. 168; *Harkness v. Hyde*, 98 U. S. 476.) There was no waiver of special appearance on motion to quash by thereafter filing a qualified demurrer. (*Deidesheimer v. Brown*, 8 Cal. 340; *Gray v. Hawes*, 8 Cal. 569; *Lyman v. Milton*, 44 Cal. 631; *Kent v. West*, 50 Cal. 185; *Harkness v. Hyde*, 98 U. S. 476.)

Kingsbury & McGowan, for Respondent.

No special appearance is allowable in a case, except to raise jurisdictional questions. If a party so far appears to call into action the powers of the court for any purpose except to decide upon its own jurisdiction, it is a full appearance. (*Clark v. Blackwell*, 4 G. Greene (Iowa), 44; *Grantier v. Rosecrance*, 27 Wis. 488; *Anderson v. Coburn*, 27 Wis. 558; *Curtis v. Jackson*, 23 Minn. 268.)

HAYS, C. J.—This was an action brought to foreclose a mortgage given by defendants to respondent on property situate in Alturas county. The complaint, among other things, sets out that the defendants gave their joint notes to respondent for \$850, with interest thereon. To secure the payment of said notes they made, executed, and delivered their joint mortgage on property therein described. It appears that this action to foreclose the mortgage was duly commenced, and defendant Quantrell appeared in the court below. Defendant Ward, through his attorney, appeared specially, and moved the court to vacate the service of the summons on account of alleged defective service, and also filed and served a demurrer to the complaint. The motion and demurrer were each overruled, and judgment of foreclosure entered; also judgment entered for any deficiency that might be found due after applying the proceeds from sale of mortgaged premises. The defendant Ward appeals from said judgment, and from the whole thereof. Quantrell does not appeal, and did not appear in this court. The notice of appeal was addressed to the plaintiff alone. Upon the hearing of the case respondent asks to have the appeal dismissed, and denies the jurisdiction of this court on the ground that Quantrell was an adverse party to appellant, and that no notice of appeal was given to him.

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Opinion of the Court—Hays, C. J.

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The code provides that any party aggrieved may appeal. By the term "any party" we understand any person who is a party to the action. The party or person appealing is known as the appellant, and the adverse party as the respondent. The appeal is taken by filing with the clerk of the court in which judgment is entered a motion stating they appeal from the judgment, or some specified part thereof (Code, sec. 643) and serving a similar notice on the adverse party.

The question now arises, Is Quantrell an adverse party within the meaning of this section of the code, under the circumstances of this case? It was held in *Senter v. De Bernal*, 38 Cal. 637, that every party whose interest in the subject matter of appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is an "adverse party," within the meaning of the code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener. Such, in substance, has been held by many other authorities. Such being the law, we must hold that Quantrell is an adverse party from the facts as they appear in this case, as he may be seriously affected by the reversal or modification of the judgment. He should therefore have been served with the notice of appeal. As it was not so served, and he has not appeared in this court, the appeal must be dismissed. (*Parker v. Denny*, 2 Wash. Ter. 360, 7 Pac. 892; *Luco v. Commercial Bank of San Diego* (Cal.), 8 Pac. 274; *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Mills v. Brown*, 16 Pet. 525.)

It is so ordered.

Buck and Broderick, JJ., concur.

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Opinion of the Court—Broderick, J.

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(January 25, 1886.)

PEOPLE v. O'CALLAGHAN.

[9 Pac. 414.]

**HOMICIDE—STATUTORY DEFINITION OF MURDER.**—The statutory definition of murder of the first degree is a distinct and substantive definition, and excludes therefrom certain homicides which would be murder at common law.

**INDICTMENT—LANGUAGE OF STATUTE.**—An indictment for murder in the first degree must be substantially in the language of the statute defining that degree of the offense.

**SAME—COMMON LAW.**—An indictment for murder which would be sufficient at common law is not necessarily so for murder of the first degree under the statute.

**SAME—CRIMINAL PLEADINGS—PRACTICE.**—The indictment for murder need not name the degree, but must show by a statement of facts substantially in the language of the statute the highest grade of the offense for which the party charged is to be tried, and then a conviction may be had for any lower degree included therein.

**INDICTMENT—SUFFICIENCY OF—QUESTIONING ON APPEAL.**—The indictment must support the judgment, and this question may be raised for the first time in the supreme court.

**SAME—VERDICT—MODIFIED VERDICT—PRESUMPTION ON APPEAL.**—Where the indictment sufficiently charges murder in the second degree, and the verdict is "guilty of murder of the first degree as charged," and there is no claim that the verdict is not supported by the evidence, and no other error appearing, the supreme court may treat such verdict as a verdict for murder in the second degree and modify the judgment of the court below accordingly.

(Syllabus by the court.)

**APPEAL** from District Court, Bingham County. Judgment modified and affirmed.

Smith & Wright, for Appellant.

D. P. B. Pride, Attorney General, and H. M. Bennett, for the People.

No briefs found on file.

**BRODERICK, J.**—The defendant was indicted, tried, and convicted of murder in the first degree, and sentenced to be

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executed. From this judgment he appeals, and assigns as error that the indictment is not sufficient to support the verdict and judgment. The indictment charges substantially that the defendant feloniously, willfully, and of his malice aforethought did make an assault on Thomas Breen; that the defendant feloniously, willfully, and of his malice aforethought shot and wounded said Breen, and from the effects of the wound he died.

This is the modern common-law form for charging murder, and the first question for consideration is whether, under our statutes, the omission to charge the offense substantially in the language of the statute defining murder in the first degree is fatal to the judgment. The first definition of murder by our statute is as follows: "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." This is a general description, and embraces all murder known to our law, whether of the first or second degree. Following this provision is a definition of express and implied malice, and then a more particular definition of murder in the first degree, which reads: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree."

It will be observed that the indictment does not charge that the killing was done with deliberation and premeditation. We have been referred to many respectable authorities which hold that the common-law indictment for murder sufficiently charges murder in either degree, but the adjudications upon this question are by no means uniform. It has been considered in some cases that the expression, "with malice aforethought," is synonymous with "deliberation and premeditation." In *People v. Ah Choy*, 1 Idaho, 317, our court seems to have adopted this view; but it is difficult to understand from this case what the indictment really contained. However, it was assumed in this,

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and one other case we find, that such an indictment sufficiently charges murder in the first degree; and we doubt not that prosecuting officers in drawing indictments have generally followed the practice thus sanctioned. If these adjudications, unsatisfactory as they are, had been made in civil actions, fixing and establishing rules of property, and property rights had accrued under them, we would hesitate to open the question; but in the case we are considering, and in the class to which the rule would apply, we take it there are no claims to vested rights which anyone will care to assert. It is a well-established principle of criminal pleading that the substantive facts necessary to constitute the offense charged must appear in the indictment with sufficient certainty to enable the party to defend against the charge and the court to pronounce judgment. Indeed, it is fundamental that the party shall be informed by the indictment of the "nature and cause of the accusation." This indictment contains no averment that the killing was perpetrated by means of poison, or lying in wait, or by torture, or in an attempt to commit any of the felonies specified in the statute quoted. It is admitted that the claim to convict for murder in the first degree was based upon evidence tending to show that the killing was willful, deliberate, and premeditated. It is therefore this kind of killing that we must consider in this case.

At the common law the offense of murder was complete whether the killing was premeditated or was the result of felonious assault, with malice aforethought; yet since our statute has divided murder into the first and second degree, and requires that the killing shall be shown to be deliberate and premeditated (that is, intended) in order to constitute murder of the first degree, we think such premeditated killing must be charged in the indictment as well as proved by the evidence, in order to sustain a conviction for the higher offense. In other words, since the statute has narrowed and qualified the general definition of murder by a distinct and substantive definition of murder of the first degree, excluding therefrom certain homicides which would be murder at the common law, we think it follows that an indictment for murder as at common law would not necessarily include the charge of murder in the

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first degree. In this view we are sustained by the later and better authorities. (2 Bishop's Criminal Procedure, 564-585; *State v. McCormick*, 27 Iowa, 402; *Fouts v. State*, 4 G. Greene, 500; *Fouts v. State*, 8 Ohio St. 109; *Kain v. State*, 8 Ohio St. 306; *State v. Brown*, 7 Or. 198; *State v. Brown*, 21 Kan. 38; *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872; Kelly on Criminal Law, 3448, and cases cited; *Hagan v. State*, 10 Ohio St. 459; *State v. Feaster*, 25 Mo. 327.)

It is true that under the rules of criminal procedure, as now generally understood, where the statute has carved two or more offenses out of the same act, and a party is indicted for the highest offense, or grade of offense, he may be convicted, if the evidence will warrant it, of any lower offense, or grade of offense, that is sufficiently charged in the indictment (*People v. Shotwell*, 27 Cal. 400); but we are not aware of any class of cases where courts have allowed a conviction for a higher offense, or grade of offense, than that charged, except in murder cases, and we cannot accept the doctrine that a party tried for any crime can be convicted of an offense of which he is not fairly charged.

Respondent contends that this indictment is sufficient under the amendment to the Criminal Practice Act (13th Sess. Laws, 97), which is as follows: "The indictment shall contain the title of the action, and the name of the court to which the indictment is presented, and the names of the parties, and shall be sufficient if it charge the offense substantially in the language of the statute prohibiting the crime, and in such a manner as to enable a person of common understanding to know what is intended." By this statute the legislature has not undertaken to dispense with the averments necessary to inform the party of the offense charged, but has only simplified the manner of charging the facts. Before a party is placed upon trial for a felony or other offense he is entitled to have the offense pleaded, not necessarily in the technical language of the common law, but substantially in the language of the statute defining the offense, and in such manner as to enable a person of ordinary understanding to know what is intended, and for what offense he is to be tried. This statute modifies the intricate and exacting common-law rules of criminal pleading, and

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Opinion of the Court—Broderick, J.

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seeks to establish a plain rule more in harmony with the advanced notions of criminal jurisprudence. This the legislature had the power to do, and this, in our judgment, is what was intended.

The appellant asks that the instructions given by the court of its own motion be reviewed. The instructions thus given are not here by bill of exceptions, and cannot be reviewed in this court. (*People v. Biles*, ante, p. 114, 6 Pac. 121.)

The indictment sufficiently charges murder in the second degree, and we are of the opinion that under and in virtue of the general power given to modify we should sustain the verdict, and treat it as a verdict of murder of the second degree, which is included in the first, and modify the judgment accordingly. We are not without precedents and authority in reaching this determination. (*Fouts v. State*, 4 G. Greene, 500; *State v. McCormick*, 27 Iowa, 414; *Johnson v. Commonwealth*, 24 Pa. St. 387.)

This case is distinguished from *Hogan v. State*, 30 Wis. 428, 11 Am. Rep. 575, and *People v. Campbell*, 40 Cal. 129. In these cases the jury found the defendants guilty as charged, but did not find the degree; hence the court could not say whether they were found guilty of murder or manslaughter.

In the case at bar the defendant was found guilty of murder, and the evidence sustains the verdict, and we do not think justice would be promoted by ordering a new trial, or by remanding the cause. It is therefore considered and adjudged by the court here that the judgment of the court below be, and is hereby, modified so as to say that the defendant, E. J. O'Callaghan, be confined in the territorial prison of the territory of Idaho, at hard labor, during his natural life.

Hays, C. J., and Buck, J., concurring.



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Opinion of the Court—Buck, J.

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(January 25, 1886.)

## PEOPLE v. BARNES.

[9 Pac. 532.]

**EVIDENCE.**—The provision of our Code of Civil Procedure, section 897, that “the credibility of witnesses may be drawn in question by evidence affecting their character for truth, honesty and integrity, is simply declaratory of the common law, and establishes no new rule for the impeachment of witnesses.”

**CRIMINAL PRACTICE.**—When the evidence in a criminal trial is not sufficient to sustain a conviction, the remedy by defendant is by motion asking the court to instruct the jury to find a verdict of not guilty. A motion to nonsuit is not proper in criminal practice.

**INCEST.**—The crime of incest may be committed by one party to the act without the consenting mind of the other party thereto.

(Syllabus by the court.)

**APPEAL** from Second Judicial District, Alturas County.

Alanson Smith and Angel & Sullivan, for Appellant.

The court erred in refusing defendant's motion for a nonsuit; the crime proven was rape, if anything, having been committed by force. (*De Groat v. People*, 39 Mich. 124; *People v. Jenness*, 5 Mich. 305, 321; *People v. McDonald*, 9 Mich. 150; *People v. Hanidan*, 1 Park. Cr. Rep. 244; *State v. Shear*, 51 Wis. 460, 8 N. W. 287; *Croghan v. State*, 22 Wis. 444; *Noble v. State*, 22 Ohio, 541; *State v. Thomas*, 53 Iowa, 214, 4 N. W. 908; *Spear v. State*, 60 Ga. 381; *State v. Caldwell*, 8 Baxt. (Tenn.) 576; *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691.)

D. P. B. Pride, Attorney General, for People.

No brief found on file.

**BUCK, J.**—The defendant was convicted on an indictment for an offense under section 129, chapter 10, Crimes and Punishment Act, page 353, of our Revised Laws of 1875. The section reads as follows: “Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, shall, on conviction, be punished by imprisonment in the ter-

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ritorial prison not less than one nor more than ten years.” The indictment specifies the offense charged therein as a felony, and in the charging part uses substantially the words of the statute.

In the argument on appeal three errors—one of instruction to the jury, one of ruling upon the admission of evidence, and one of the refusal to nonsuit the prosecution—were especially insisted upon. In the bill of exceptions the alleged errors in instructions of the court are specified in the following words: “5. The court erred in refusing to give the instructions asked for by the defendant; 6. The court erred in giving the jury the instructions asked for by the prosecution.”

The particular error in the charge of the court set out in appellant’s brief, and argued on appeal, is in the giving the following instruction: “The defendant is indicted for the crime of incest. Under the laws of this territory persons being within the degrees of consanguinity within which marriages by law are declared to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, are guilty of incest.” It is claimed that the offense here charged is not incest, and that defendant was tried for an offense not charged in the indictment, and the jury misled by this instruction. We are able to see in this instruction nothing more than a recitation of the elements of the offense set out in the statute, and as charged in the indictment, with the addition of the name of the offense as it would have been designated at common law. An inspection of the record, however, shows that this definition of the offense was asked for by the defendant. It is hardly necessary to say that one cannot complain of an error, even had it existed, which was made at his own request.

The error in the admission of evidence, as specified in the bill of exceptions, was in the refusal by the court to allow the following questions to be answered: “1. You may state if you know whether Maggie Barnes is a truthful girl; 2. You may state whether Maggie has repeatedly told falsehoods.” The authority relied upon by appellant as sustaining his exceptions to the ruling of the court in refusing answers to these questions is an alleged ruling of the court in the famous case of

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Opinion of the Court—Buck, J.

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*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131, not produced upon the argument, and section 897 of our Code of Civil Procedure. That section provides that "in every case the credibility of the witness may be drawn in question by evidence affecting his character for truth, honesty, or integrity." This section adds nothing to the well-established rules of impeaching the credibility of witnesses. Greenleaf says that the credit of witnesses may be impeached by general evidence affecting their credit for veracity. The evidence introduced must be competent, and its introduction regulated by well-established rules. The first question calls for the opinion of one witness as to the truthfulness of another, and the second as to the knowledge of one witness as to particular falsehoods told by another. The first is clearly an invasion of the province of the jury, who are the judges of the credibility of witnesses; and the second is contrary to the well-established rule that, for the purpose of impeaching the credit of witnesses, the examination must be confined to general reputation, and is not permitted as to particular facts. (1 Greenleaf on Evidence, 14th ed., sec. 461.)

The third alleged error urged by defendant is "that the court erred in refusing defendant's motion for a nonsuit." In criminal practice the motion to nonsuit is not the appropriate remedy for defendant in case of a failure of proof. If the prisoner cannot be convicted, he is entitled to a verdict of acquittal. There can be no nonsuit as in civil cases. (1 Bishop's Criminal Procedure, sec. 961; *People v. Bennett*, 49 N. Y. 137.) "In this case the court hold that after the trial is commenced the verdict of the jury must be pronounced, but this may be done under the advice and direction of the court." In that case the motion was made to discharge the prisoner on the ground that there was no case for the jury. The appellate court say the trial court had no power to grant the precise motion made—the jury must pronounce the verdict. Section 373 of our Criminal Practice Act provides that "if, at any time after the evidence on either side is closed, the court deem the same insufficient to warrant a conviction, it may advise the jury to acquit the defendant; but the jury shall not be bound by such advice, nor shall the court, for any cause, prevent the jury from giving a verdict except as provided by sec-

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Opinion of the Court—Buck, J.

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tions 360, 361, and 365," which do not apply to the case at bar. It is apparent that the motion to nonsuit was properly overruled. It was, however, held in *People v. Bennett*, above cited, that, although the motion to discharge the prisoner could not have been granted in the form in which it was made, to the end that substantial justice might be done, it might be regarded as a request that the court advise the jury to acquit. Adopting this suggestion in the case at bar, we may consider whether the ground upon which it was made was well taken. It is asserted by appellant and admitted by respondent that the prosecuting witness, the person with whom the defendant committed the offense of fornication, was defendant's daughter, an infant, under twelve years of age; and that under our statute she was incapable of giving consent to the alleged illicit intercourse. The point made by defendant in the motion for nonsuit was that the consent of both parties to the illicit intercourse was not necessary to constitute the crime of incest, and that, the prosecuting witness being of that tender age of which the law repudiates the possibility of consent, the element of mutual consent was wanting, and the defendant should have been acquitted.

This involves the legal proposition whether fornication, as known at common law, may be committed by one person without the concurrent criminality of the other party to the act. The arguments of the attorneys upon this question were exhaustive, and brought to the attention of the court a large number of authorities of adjudicated cases in which directly opposite conclusions were reached. Bouvier defines "fornication" to be "the unlawful knowledge by an unmarried person of another." This definition does not imply that carnal knowledge must necessarily be mutual. 2 Bishop's Criminal Law, sections 11, 24, defines it to be "the voluntary sexual intercourse of one person with another." There must be a voluntary consent of the will on the part of the one; but may not the other party to the act be the victim of force or fraud, or a child so young that the law regards her incapable of giving consent? The terms used in the statute are, "Persons being within the degrees of consanguinity," etc., "who shall commit fornication with each other." Evidently the term "fornication" is used

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Argument for Appellant.

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in the ordinary, common-law meaning. We have been unable to find any definition of that term in the common-law authorities which necessarily implies a consenting mind in both parties to the act. It is maintained that the words "with each other," used in the statute, imply that the offense is committed only when both participants therein do so with a willing mind. Many of the adjudicated cases sustaining this theory seem to be founded upon such a construction of the language used. We are unable to adopt this construction. We are rather of the opinion that the better reason is found with the opposite authorities, which hold that neither the language of the statute, nor the true definition of the terms employed, imply that a mutuality of consent is necessary to constitute the crime of incest. In support of our conclusions we cite Bishop on Statutory Crimes, sec. 660; Wharton's Criminal Law, sec. 1751; *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *Mercer v. State*, 17 Tex. App. 452; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207.

We find no error in the record, and the judgment below is affirmed.

Hays, C. J., and Broderick, J., concurring.

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(February 8, 1886.)

MONTANDON v. WALKER.

[9 Pac. 608.]

**FINDINGS OF REFEREE—ERROR—AFFIRMATIVE SHOWING.**—The party alleging error in the findings of a referee must make it affirmatively appear.

**SAME—PRESUMPTION OF CORRECTNESS OF FINDINGS.**—Where appellant fails to show, affirmatively, error in the findings of a referee, the correctness of such findings are presumed, and judgment thereon will be affirmed.

APPEAL from District Court, Alturas County. Affirmed.

A. F. Montandon, for Appellant.

The referee failed to find upon all the material issues raised by the pleadings and the plaintiff was entitled under the code,

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Opinion of the Court—Hays, C. J.

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as a matter of right, to such findings, and such failure is ground for reversal. (Hayne on New Trial and Appeal, sec. 239, subd. 2, p. 718, and cases cited.) A judgment based upon findings which do not determine all the issues raised by the pleadings is a decision against law, for which a new trial may be had. (*Knight v. Roche*, 56 Cal. 15; *Brown v. Burbank*, 59 Cal. 535; *Soto v. Irvine*, 60 Cal. 436.)

L. Vineyard and Angel & Sullivan, for Respondent.

The finding need not be directly and pointedly made that each of the several allegations of the complaint or the answer is, or is not, true, but if the court finds such facts as will be sufficient to necessarily determine every material issue in the cause, the requirement of the law in that respect will be satisfied. (Hayne on New Trial and Appeal, 723; *Schroeder v. Jahns*, 27 Cal. 281.)

HAYS, C. J.—Appellant brought this action in the district court of Alturas county against the respondent to recover a *quantum meruit* for professional services as an attorney at law rendered by appellant for respondent. The complaint sets out three causes of action. The defendant answers by a general denial; also attempts a special denial of each of the causes of action. The answer also alleges that all the services set forth in the complaint were performed under a special agreement for a stipulated price, and that the plaintiff had been fully paid therefor. While the answer may have been open to criticism, in not having been as specific in denial as the code requires, yet it was treated by the parties as sufficient, and no objection made to it in the court below. By consent of parties the cause was duly referred, to be heard, tried, and determined. It was afterward tried by the referee, and he found in favor of defendant, and judgment was entered accordingly, from which plaintiff appeals to this court. It was contended that the referee did not file his report within twenty days after the close of the testimony in the case. While the statute is doubtless directory (Hayne on New Trial and Appeal, sec. 246, and cases there cited), yet if it is mandatory, no such error appears, and this court must presume that the report was

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Opinion of the Court—Buck, J.

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filed in time. (*Hazard v. Cole*, 1 Idaho, 276; Hayne on New Trial and Appeal, sec. 285.)

It is also contended that the referee failed to find on all the material issues. We think this position not well taken, the *onus* being upon the appellant to show that error was committed, and having failed to do so, we think the judgment should be affirmed.

Buck and Broderick, JJ., concurring.

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(February 8, 1886.)

## PURDUM v. TAYLOR.

[9 Pac. 607.]

**BILL OF EXCEPTIONS—PRACTICE—APPEAL—REVIEW.**—An exception to the order of the court sustaining a motion for judgment on the pleadings must be made a part of the record on appeal by bill of exceptions settled under section 406 of the Code of Civil Procedure before it will be reviewed on appeal.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County. Affirmed.

L. Vineyard and James H. Hawley, for Appellants.

A pre-emptor of public land cannot mortgage his interest before entry. (1 Jones on Mortgages, sec. 177.) The act of acquiring title by pre-emption is a personal privilege; but the applicant cannot transfer any right arising from his possession so as to vest it in another. (*Quinn v. Kenyon*, 38 Cal. 502; *Moore v. Besse*, 43 Cal. 514; *Bray v. Ragsdale*, 53 Mo. 170.) "Before a valid mortgage can be made of a pre-emption of public land, an entry of it according to law must be made." (Freeman on Executions, sec. 176.) The judgment on its face is void. (Freeman on Judgments, sec. 117.)

No brief of respondents on file.

**BUCK, J.**—This action was brought for the foreclosure of a mortgage. The defendants answered, alleging that the prem-

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Argument for Appellant.

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ises described in the mortgage were, at the time of the execution thereof, public lands of the United States, upon which he was living as a pre-emptor. Upon the issues thus made, upon the motion of defendant, the court entered judgment on the pleadings. The appeal is from the judgment.

The order granting the motion for judgment on the pleadings was a final decision in the action, to which an exception is deemed to have been taken under section 403 of our Code of Civil Procedure. To make this exception available on appeal it should have been settled in a bill of exceptions under section 406 of the code, and made a part of the record. (*Guthrie v. Phelan*, 6 Pac. 107; *Guthrie v. Fisher*, 6 Pac. 111; *Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641; *Graham v. Linehan*, 1 Idaho, 780; *Fox v. West*, 1 Idaho, 782; *Hemme v. Hays*, 55 Cal. 337.)

The ruling of the court upon the motion for judgment on the pleadings not being questioned in the record, we have only to look to the complaint to ascertain whether its allegations are sufficient to sustain the judgment. (*Ray v. Ray*, 1 Idaho, 705; *People v. Hunt*, 1 Idaho, 433.)

We think the complaint is sufficient, and the judgment is affirmed. (*Hyde v. Harkness*, 1 Idaho, 638.)

Hays, C. J., and Broderick, J., concurring.

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(February 8, 1886.)

AVELINE v. RIDENBAUGH.

[9 Pac. 601.]

**EQUITY—INJUNCTION—LESSOR AND LESSEE.**—Equity will not aid one in maintaining an interest in leased premises, acquired by him with full knowledge, contrary to the express covenants of the lease against his lessor.

(Syllabus by the court.)

APPEAL from District Court, Ada County. Reversed.

Huston & Gray, for Appellant.

“When the facts show clearly that the rights involved in the controversy and the remedies demanded are purely legal, and



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Opinion of the Court—BUCK, J.

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completely within the scope of ordinary legal proceedings, the court of equity will itself take the objection at any stage of the cause, and will dismiss the suit, although no objection has in any way been raised by the parties." (1 Pomeroy's Equity Jurisprudence, 114, 115; *Hipp v. Babin*, 19 How. 57, 271, 278; *Parker v. Winnipissogee Co.*, 2 Black, 545, 550, 551; *Earl of Oxford's Case*, 2 Lead. Cas. in Eq., 1291, and note.) "When it is apparent on the face of the bill that a court of chancery has no jurisdiction of the subject matter of the cause, and that the party aggrieved has an adequate remedy at law, the bill is obnoxious to a demurrer." (1 High on Injunctions, sec. 28; *Winkler v. Winkler*, 40 Ill. 179.)

Wood & Wilson, for Respondent.

If the injury is irreparable equity will interpose. (Hilliard on Injunctions, 2 et seq.; 3 Wait's Actions and Defenses, 783-785; *Wilson v. City of Mineral Point*, 39 Wis. 160; *West Point Iron Co. v. Reymert*, 45 N. Y. 703.) "The remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity, to take away the plaintiff's right to the latter." (*Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2133; *Morris v. Thomas*, 17 Ill. 112.) "When sufficient facts are not affirmatively averred to invest court of equity with jurisdiction to grant the relief specifically asked, it is the chancellor's duty to examine the allegations contained in the bill, to see if from them he would be entitled to grant other and further redress, under the prayer for general relief." (*Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655; Story's Equity Pleadings, p. 36, sec. 40; Story's Equity Pleadings, p. 459, sec. 528.)

BUCK, J.—On the sixth day of November, 1885, the defendant, Ridenbaugh, leased to one Sing Lee Tong certain real estate, by an indenture in writing, for the term of one year. Upon said premises said Lee Tong had at the time said lease was executed and delivered, and for some time prior thereto had had thereon, about two thousand cords of wood, placed there with the consent of defendant.

The lease contained two covenants of importance in this action, as follows: "1. And the said party of the second part

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Opinion of the Court—Buck, J.

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hereby promises and agrees that he will not let or sublet the whole or any part of said premises without the written consent of the party of the first part; 2. It is hereby agreed that if default shall be made in any of the covenants herein contained, it shall be lawful for the party of the first part to re-enter said premises and to remove all persons therefrom." The premises described in the lease are entirely surrounded by other land of the defendant, the lessor, and the only means of ingress and egress thereto and therefrom is by a way which has been used as a public way to said premises for several years.

On the seventh day of November, 1885, the day succeeding that upon which the lease was executed, the lessee, Lee Tong, sold to these plaintiffs all of the wood upon said premises, "and by the terms of said sale gave them until the expiration of said lease to remove said wood from said leased premises." Soon after said sale defendant forbade the use of said premises to plaintiffs, and prohibited them from passing over said way for the purpose of removing said wood, and on the ninth day of November entirely obstructed said way and fenced the same; and, although the privilege of passing upon said road to said premises has been demanded by plaintiffs of defendant for the purpose of removing said wood, the defendant continues to obstruct the same, and prevents plaintiffs from removing said wood from said premises.

On the twelfth day of November, 1885, the plaintiffs commenced this action, setting forth the above state of facts in their complaint, and pray relief: 1. That defendant be restrained from obstructing said road leading to said premises for one year from November 1, 1885; 2. That defendant be required to remove all obstructions to the free use and passage of said road; 3. For other proper relief, and their costs.

To this complaint the defendant interposed a general demurrer. The demurrer being overruled, and judgment entered for plaintiffs the defendant appeals therefrom, and urges as error the ruling of the court in overruling the demurrer.

There are two questions involved in the appeal, and argued thereon, to wit: 1. Does the complaint show equity on the part of plaintiffs; and, 2. Is there no plain, speedy, and adequate remedy at law available to plaintiffs?

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Opinion of the Court—Buck, J.

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It is a fundamental principle of equity jurisprudence that both of these conditions must exist before equity can be successfully invoked in behalf of a litigant. A party may have a cause of action founded upon the present principles of equity, but if the law affords him adequate relief, equity will not interfere. So, on the other hand, the law may be entirely inadequate to his case, yet, if his cause is lacking in equity, he must abide the remedy which the law affords him. (1 Pomeroy's Equity Jurisprudence, sec. 400; *Fackler v. Ford*, 24 How. 322.)

The plaintiffs knew the tenure by which Lee Tong held the premises. They had full knowledge of the lease, and the covenants that they should not be sublet, and that in case of a breach of any of the covenants the lessor might re-enter and remove all persons therefrom. Notwithstanding this knowledge, the plaintiffs purchase, with the wood, the use of the premises for one year from November 1, 1885, for the purpose of removing the wood therefrom, and of storing the same thereon. This was clearly a subletting of the premises, against the express provision of the lease. Under the covenant to re-enter, within a day or two thereafter, the defendant, the lessor, took possession of the premises, forbade the plaintiffs to enter, and closed up the road thereto. We are unable to see that the plaintiffs are in a position to claim the interposition of equity in their behalf. To grant a restraining order prohibiting the lessor from controlling the premises after condition broken would be to hold that the lessor may not insist on such covenants as seem to him proper. Such a decision would be contrary to the established doctrines. (2 High on Injunctions, sec. 1142; *Steward v. Winters*, 4 Sand. 587; *His Imperial Majesty etc. v. Providence Tool Co.*, 21 Blatchf. 437, 23 Fed. 572; *Root v. Railway Co.*, 105 U. S. 189; *Grand Chute v. Winegar*, 15 Wall 373.) It seems but a suit in replevin in disguise.

It is claimed that Lee Tong did not sublet the premises; that he simply authorized the plaintiffs to remove the wood therefrom at any time within the year. It is alleged in the complaint that plaintiffs are wood merchants. This being so, the peculiar terms of the sale, if they mean anything, mean that the plaintiffs may store this wood upon defendant's premises during the year, and may at any and all times enter thereon to remove the same, cord by cord, or in larger quan-

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Opinion of the Court—Buck, J.

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ritorial prison not less than one nor more than ten years." The indictment specifies the offense charged therein as a felony, and in the charging part uses substantially the words of the statute.

In the argument on appeal three errors—one of instruction to the jury, one of ruling upon the admission of evidence, and one of the refusal to nonsuit the prosecution—were especially insisted upon. In the bill of exceptions the alleged errors in instructions of the court are specified in the following words: "5. The court erred in refusing to give the instructions asked for by the defendant; 6. The court erred in giving the jury the instructions asked for by the prosecution."

The particular error in the charge of the court set out in appellant's brief, and argued on appeal, is in the giving the following instruction: "The defendant is indicted for the crime of incest. Under the laws of this territory persons being within the degrees of consanguinity within which marriages by law are declared to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, are guilty of incest." It is claimed that the offense here charged is not incest, and that defendant was tried for an offense not charged in the indictment, and the jury misled by this instruction. We are able to see in this instruction nothing more than a recitation of the elements of the offense set out in the statute, and as charged in the indictment, with the addition of the name of the offense as it would have been designated at common law. An inspection of the record, however, shows that this definition of the offense was asked for by the defendant. It is hardly necessary to say that one cannot complain of an error, even had it existed, which was made at his own request.

The error in the admission of evidence, as specified in the bill of exceptions, was in the refusal by the court to allow the following questions to be answered: "1. You may state if you know whether Maggie Barnes is a truthful girl; 2. You may state whether Maggie has repeatedly told falsehoods." The authority relied upon by appellant as sustaining his exceptions to the ruling of the court in refusing answers to these questions is an alleged ruling of the court in the famous case of

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Opinion of the Court—Buck, J.

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*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131, not produced upon the argument, and section 897 of our Code of Civil Procedure. That section provides that "in every case the credibility of the witness may be drawn in question by evidence affecting his character for truth, honesty, or integrity." This section adds nothing to the well-established rules of impeaching the credibility of witnesses. Greenleaf says that the credit of witnesses may be impeached by general evidence affecting their credit for veracity. The evidence introduced must be competent, and its introduction regulated by well-established rules. The first question calls for the opinion of one witness as to the truthfulness of another, and the second as to the knowledge of one witness as to particular falsehoods told by another. The first is clearly an invasion of the province of the jury, who are the judges of the credibility of witnesses; and the second is contrary to the well-established rule that, for the purpose of impeaching the credit of witnesses, the examination must be confined to general reputation, and is not permitted as to particular facts. (1 Greenleaf on Evidence, 14th ed., sec. 461.)

The third alleged error urged by defendant is "that the court erred in refusing defendant's motion for a nonsuit." In criminal practice the motion to nonsuit is not the appropriate remedy for defendant in case of a failure of proof. If the prisoner cannot be convicted, he is entitled to a verdict of acquittal. There can be no nonsuit as in civil cases. (1 Bishop's Criminal Procedure, sec. 961; *People v. Bennett*, 49 N. Y. 137.) "In this case the court hold that after the trial is commenced the verdict of the jury must be pronounced, but this may be done under the advice and direction of the court." In that case the motion was made to discharge the prisoner on the ground that there was no case for the jury. The appellate court say the trial court had no power to grant the precise motion made—the jury must pronounce the verdict. Section 373 of our Criminal Practice Act provides that "if, at any time after the evidence on either side is closed, the court deem the same insufficient to warrant a conviction, it may advise the jury to acquit the defendant; but the jury shall not be bound by such advice, nor shall the court, for any cause, prevent the jury from giving a verdict except as provided by sec-

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Opinion of the Court—Broderick, J., Dissenting.

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rightly overruled. The Chinaman could sell the wood and the plaintiffs could purchase. Under the circumstances of this case the right to purchase the property carried with it the right to possess and enjoy the same. (*Webber v. Gage*, 39 N. H. 182.)

It will be observed that there is no dispute as to the ownership of the wood, or plaintiffs' right to the possession. But it is contended on behalf of the defendant that the case presented by the complainants does not fall within equity jurisdiction, and the reason assigned is, that relief at law, by replevin, would be complete and adequate. It is conceded that, if the remedy at law is sufficient, equity cannot give relief; but it is not enough that the plaintiffs could have obtained possession by replevin. The remedy at law must be "plain, speedy, and adequate," or, in other words, "as practical and efficient to the ends of justice and its prompt administrations as the remedy in equity." (*Watson v. Sutherland*, 5 Wall. 78; *Hager v. Shindler*, 29 Cal. 47; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2025.)

The complaint also alleges that the plaintiffs were dealers in wood, and this was the only wood they owned from which to supply their customers; that they had contracted with their customers to furnish wood for the winter, which was approaching, and that if the defendant was not restrained and plaintiffs put into immediate possession of their property irreparable injury would ensue. Certainly this is good ground for equitable interposition. (*Wilson v. City of Mineral Point*, 39 Wis, 160.) The action at law would not have afforded an adequate remedy in this case. Had such an action been instituted, the defendant, by executing an undertaking, could have retained the property, and the measure of damages, if the property were not sold, could not have extended beyond the injury done to it, or, if sold, to the value of it when taken, with the interest from the time of taking down to the trial. There could have been no compensation for loss of trade, and commercial ruin would probably have been the result before an action at law would have terminated.

Considering the character of the property, and the time required to remove it, and all the facts in relation to the trans-

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Argument for Respondent.

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action between the parties, it seems clear to me that the remedy in equity could alone furnish adequate relief, and that the demurrer to the complaint was rightly overruled.

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(February 8, 1886.)

MURPHY v. FULD ET AL.

[9 Pac. 609.]

**APPEAL—INSUFFICIENT RECORD—AFFIRMANCE.**—Where the complaint will support the judgment, appellant must show error or judgment will be affirmed.

Bruner, Parsons & Bruner and Hawley & Ruick, for Appellants.

The judgment must accord with, and be warranted by, the pleadings of the party in whose favor it is rendered. A judgment that is not supported by the pleadings is as fatally defective as one which is not sustained by the evidence. (*Bachman v. Sepulveda*, 39 Cal. 688.) When a judgment is rendered upon the default of the defendant, the judgment must follow the prayer of the complaint. (*Lowe v. Turner*, 1 Idaho, 107.) If the wife has signed the mortgage alone, and not the bond, it will be erroneous to demand a personal judgment against her. (*Gebhart v. Hadley*, 19 Ind. 270.)

A. F. Montandon, for Respondent.

No bill of exceptions being in the record, nor any error assigned, the judgment or decree must stand unless the complaint will not support any judgment. (*Lamkin v. Sterling*, 1 Idaho, 120; *Smith v. Sterling*, 1 Idaho, 128; *Diehl v. Hull*, 1 Idaho, 352.) Any part of a description that may be disregarded and leave sufficient to identify the land may be treated as surplusage. (*Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699; *Worthington v. Hylyer*, 4 Mass. 205; *Peck v. Mallams*, 10 N. Y. 582.) The description in the decree is at least *prima facie* sufficient. (*Whitney v. Buckman*, 13 Cal. 536; *De Leon v. Higuera*, 15 Cal. 483; *Hancock v. Watson*, 18 Cal. 138.)

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Argument for Appellants.

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HAYS, C. J.—This appeal is from the judgment. There is no bill of exceptions in the record. It nowhere appears in the transcript that defendant Rosa Fuld is married; hence the argument on that point cannot be considered. We think the complaint will sustain the judgment.

Judgment affirmed.

Buck and Broderick, JJ., concurring.

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(February 8, 1886.)

CARSON ET AL. v. THEWS.

[9 Pac. 605.]

**FINDINGS—CONCLUSIONS OF LAW—IF NOT RESPONSIVE TO ISSUES WILL NOT SUPPORT JUDGMENT.**—By this appeal two questions are presented for consideration here: 1. Are the findings of fact responsive to the issues? 2. Are the conclusions of law supported by the findings of fact? Findings of fact must be responsive to all the material issues raised by the pleadings. Conclusions of law based upon findings of fact outside the issues raised by the pleadings cannot be sustained, and will not support a judgment.

Kimball & Heywood, for Appellants.

*Mandamus* is the proper remedy to enforce the performance of this duty, by the auditor, where, as is the case under the law of this territory, the duty is purely ministerial. (High on Extraordinary Legal Remedies, sec 104, note 1, and sec. 17; *Turner v. Melony*, 13 Cal. 621; *Babcock v. Goodrich*, 47 Cal. 488.) The facts admitted by respondent's answer must be considered in connection with facts found by the court, and given the same weight as the findings. (Hayne on New Trial and Appeal, sec. 240; *Sift v. Muggride*, 8 Cal. 445; *Fox v. Fox*, 25 Cal. 590; *Burnett v. Stears*, 33 Cal. 473; *Bradbury v. Crouse*, 46 Cal. 289; *McDonald v. M. V. H. Assn.*, 51 Cal. 210; *Teachy v. Craig*, 55 Cal. 93.) Counties are created for the purpose of government and the administration of justice, and are charged with civil and political duties, and hence, on grounds of public



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Opinion of the Court—Broderick, J.

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policy, are not liable to garnishment. (*Divine v. Harvie*, 7 T. B. Mon. 439, 18 Am. Dec. 194, and notes at p. 200; *Merrill v. Campbell*, 69 Wis. 535, 5 N. W. 912; *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204.)

D. P. B. Pride, Attorney General, for Respondent.

No brief on file.

BRODERICK, J.—In the court below judgment was rendered against the plaintiffs, and they appealed from the judgment. The complaint alleges in substance that the plaintiffs were copartners; that on and prior to December 22, 1882, they had a contract with the county of Oneida to construct a courthouse for said county; that in pursuance of the contract they constructed the building; that on the twenty-seventh day of February, 1883, the board of county commissioners accepted said building from plaintiffs; that on the first day of March, 1883, the said board held a meeting, and the plaintiffs presented their account to the commissioners for the construction of the building; that the commissioners passed upon and allowed said account of plaintiffs, and found due thereon the sum of \$3,060.25, and made and entered an order that warrants be issued to the plaintiffs for the amount allowed.

It is further alleged that the plaintiffs, on the first day of March, 1883, presented said order to the defendant, the auditor of said county, and demanded the issue of the warrants, and that the auditor refused, and still refuses, to issue the same. The complaint demanded the issuance of a writ of mandate commanding the defendant to issue and deliver to the plaintiffs the warrants described in the complaint, and an alternative writ was issued.

The defendant answered, and denied that the plaintiffs were copartners, and denied that they contracted with the county for the construction of a courthouse; and further answering averred, in substance, that immediately upon the completion of said contract and its acceptance by said board of county commissioners there was served upon defendant a garnishment by the sheriff of Oneida county in a cause then pending in the district court of said county, wherein the Salmon River Min-

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Opinion of the Court—Broderick, J.

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ing and Smelting Company was plaintiff and Charles Carson was defendant, whereby defendant was prohibited and prevented from drawing and delivering the warrants in favor of the said Charles Carson & Co., and was directed and commanded to deliver said warrants to said sheriff; that the garnishment was served before the presentation of the order of the board of commissioners by Charles Carson, and before he requested defendant to issue and deliver the warrants to him.

Upon the issue thus joined the cause was tried, and the court found the following facts and conclusions of law: "1. That the defendant William B. Thews was, on or about the twenty-fourth day of February, 1883, served with a writ of attachment in the case of *Salmon River Min. etc. Co. v. Carson*, and the warrants mentioned in the complaint in this action were attached in his hands pursuant to said writ. That this attachment was made prior to the demand of plaintiffs herein upon said Thews to have said warrants issued and delivered to them. 2. That said action of the Salmon River Mining and Smelting Company against Charles Carson has since proceeded to judgment, and said judgment still remains unsatisfied; 3. That the plaintiffs Charles Carson and J. K. Fowler were not co-partners, under the firm name of Charles Carson & Co., or any other name, at the time mentioned in the complaint; 4. That said above-named warrants mentioned in plaintiffs' complaint were the individual property of Charles Carson and were subject to levy under the attachment in the case of *Salmon River Min. etc. Co. v. Carson*."

The court finds the following conclusions of law: 1. That William B. Thews, recorder of Oneida county, Idaho, was and is under no legal obligation, and it was not his duty, to deliver said warrants to plaintiffs herein, but that it was and is his duty to deliver the same to the sheriff of Oneida county, to be by said sheriff sold in satisfaction of the judgment in said case of the Salmon River Mining and Smelting Company against Charles Carson. It is therefore ordered that the writ herein be dismissed absolutely."

There are two questions presented by this appeal: 1. Are the findings of fact responsive to the issues made by the pleadings? 2. Do the findings support the conclusions of law drawn from the facts?

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It is well settled that our system requires a finding upon every material issue. This applies, not only to the issues raised by the allegations of the complaint, but also to the issues raised upon affirmative defenses in the answer.

The defense pleaded and relied upon herein, and the one upon which the court below based its findings and judgment, is in the averment that in another action, wherein the Salmon River Mining and Smelting Company was plaintiff and Charles Carson defendant, the question involved in this action had been adjudicated and finally settled. Are the allegations of the answer in this regard sufficient? We think not. Our system of pleading is liberal; yet it requires that the ultimate facts upon which a party expects to rely upon the trial of his cause must be pleaded. To plead another action pending, by merely alleging that a cause had been commenced and was pending, is not sufficient under our practice.

There is here no averment in the answer that Carson was summoned in the former action, or that he ever appeared voluntarily or otherwise, or that a judgment had been rendered against him. In short, there is not an allegation that sufficiently shows that there was another action pending in which the court had acquired jurisdiction over Carson, nor that the questions involved in the case at bar had been adjudicated. Hence findings 1, 2, and 4 are without the issues. These findings of fact not being supported by the pleadings, it necessarily follows that the conclusions of law based thereon are unsupported, and the judgment erroneous.

For these reasons we think the judgment should be vacated, and the cause remanded for further proceedings. As the cause may be retried in the court below upon amended pleadings, and may there be finally settled, we have not inquired into the merits of the controversy, and express no opinion thereon.

Judgment reversed, and cause remanded to the court below for further proceedings in accordance with the views herein expressed.

Hays, C. J., and Buck, J., concurring.

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Argument for Respondents.

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(February 15, 1886.)

## TAYLOR v. STEVENSON ET AL.

[9 Pac. 642.]

**POWER TO LEGISLATE IN THE TERRITORIES.**—The legislative power of the territory extends to all "rightful subjects of legislation," subject to the limitations placed thereon by the constitution of the United States.

**ACT IN CONFLICT WITH ORGANIC ACT—APPOINTMENT OF OFFICER BY GOVERNOR.**—An act of the legislative assembly of the territory which divests the governor of the power confided to him by Congress to appoint certain territorial officers is in conflict with the letter and spirit of the organic act, and therefore void.

Smith & Wright and H. M. Bennett, for Appellant.

The act of the thirteenth session, known as the Prison Commission Bill, is invalid for the following reasons: 1. The commission is illegally organized, being in violation of section 1857 of the Revised Statutes of the United States; 2. The tenth section of the act is in violation of sections 1892 to 1895 of the Revised Statutes of the United States, as amended. If the court should hold the act valid, it is as yet inoperative for the reason that no contract has been made under it; and of the fact that no contract has been made, the court will take judicial notice. (See Code Civ. Proc., sec. 896; 13th Sess., sec. 7, p. 155.) By section 4, page 155 of the Thirteenth Session Laws, power is conferred upon the prison commission to make arrangements for transportation of prisoners hereafter convicted, and to fix the compensation of the officer or agent transporting them. No such arrangements have been made; and of this fact the court also takes judicial notice.

D. P. B. Pride, Attorney General, and Silas W. Moody, for Respondents.

The governor and treasurer being *ex-officio* members of the prison commission, which is a *quasi* corporation, this action will necessarily involve the question of the validity of its organization, and this being a collateral suit, any defects in relation thereto cannot be inquired into. (*Boise City Canal v. Pink-*

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ham, 1 Idaho, 790.) The act in question, known as the Prison Commission Bill of the Thirteenth Session, is not invalid as claimed by appellant: 1. The commission is legally organized. Section 1, page 154, of the Thirteenth Session Laws, substantially complies with section 1857 of the Revised Statutes of the United States. The tenth section of the act is not in violation of sections 1892 to 1895 of the Revised Statutes as amended. (See U. S. Rev. Stats., c. 332, pp. 49, 50, secs. 1936, 1937; and Supp. U. S. Rev. Stats., par. 4, p. 559.)

BRODERICK, J.—This action was commenced in the district court of Ada county to have the governor, comptroller, and treasurer audit and allow the bill of plaintiff as sheriff of Bingham county for transporting two prisoners, under sentence, from Blackfoot, Idaho, to the territorial prison, at Boise City, at the rate of seventy cents per mile, the compensation being claimed under the provisions of an act entitled "An act to provide for the keeping, discipline, and management of the territorial prisoners." (11th Sess. Laws, 303.) This statute was approved February 10, 1881. An alternative writ of mandate was issued, and the defendants voluntarily appeared and demurred to the writ. The demurrer was treated as a motion to quash, and was sustained by the court. The plaintiff excepted and appealed, and here assigns as error the ruling upon the demurrer. The first three sections of the act under which this claim to compensation is made confers certain powers and imposes certain duties upon the governor, treasurer, and United States marshal as to the discipline, management, and maintenance of the territorial prisoners. Section 4 of the act fixes the compensation for the officers conveying the prisoners from the several counties to the territorial prison, and provides in substance that the governor, comptroller, and treasurer, or any two of them, shall audit the accounts, and the comptroller shall draw his warrant upon the territorial treasurer, and deliver the same to the officer entitled thereto, and the treasurer shall pay the same.

The defendants contend that this act is repealed, and that plaintiff's claim must be presented and audited under a subsequent statute. The thirteenth legislative assembly enacted what

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is known as the "Prison Commission Act," which was by its terms to repeal all acts in conflict therewith on and after the first day of April, A. D. 1885. Many of the provisions of this act materially differ from and are in conflict with the former act; indeed, it seems to us that the provisions of the two acts are so clearly repugnant to each other that they cannot stand together.

The principal question presented by this appeal, and the only one we need consider and determine, is whether the act known as the "Prison Commission Act" is a valid enactment. If so, then it follows that the act of 1881 is repealed; but if the act of 1885 is not valid, then it follows that the act of 1881 is still in full force, and is the law of the territory upon the subject to which it relates. The first section of the act of 1885 reads as follows:

"Section 1. The governor and territorial treasurer of Idaho territory, and one other resident thereof that they may select, are hereby appointed prison commissioners for Idaho territory, with power and authority for (in behalf of this territory) the safekeeping, maintaining, and working of all territorial prisoners now under sentence in this territory, and all who may hereafter be sentenced by the courts of this territory to labor in the penitentiary prior to March 1, A. D. 1891. Said commissioners shall have power and authority to contract with the authorities of any state or territory in the United States for the keeping, maintaining and working of the prisoners of the territory, or any part or number of them; provided, that when a contract is made in another territory or state that the price or cost of keeping and maintaining of said prisoners shall not exceed twenty-five cents per day for each prisoner, in addition to the amount allowed contractors for the labor of said prisoners."

The contention on behalf of plaintiff is that this section is in contravention of the provisions of the organic act. The provision relied upon is section 1857 of Revised Statutes of the United States, and is in the following language: "All township, district, and county officers, except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory; and all other officers not herein oth-

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erwise provided for the governor shall nominate, and, by and with the advice and consent of the legislative council of each territory, shall appoint." Congress having the paramount right to legislate for the territories, it must be conceded that if the act of the legislature under consideration is obnoxious to the objection urged against it, the same cannot be upheld or sustained.

It cannot be disputed that this act attempts to create territorial offices, and to appoint two commissioners, who, in conjunction with one other resident of the territory, to be selected and appointed by the two named, should perform the functions of such commissioners for a term of years. This delegation of authority on the part of the governor and legislative council to the two commissioners, to select and appoint another, must be regarded with some degree of misgiving and doubt. All the powers intrusted to government in the territories, as well as in the states, are divided into three departments—the executive, the legislative, and the judicial. It is wisely provided that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and it is apparent that the perfection of the system requires that the lines which separate and divide these departments shall be clearly defined and closely followed.

It is also true, as a general proposition, that the powers confided by the fundamental law to one of these departments cannot be exercised by another. And where, as in this case, the organic law provides that the governor, by and with the advice and consent of the legislative council, shall appoint the territorial officers, we do not think that the authority can be delegated to another body and the governor thus divested of his prerogative. If this can be done and sanctioned in one instance it may be in others, and by this method, or in the exercise of the two-thirds legislative rule over the governor's veto, the executive may be deprived of the appointing power which Congress has wisely confided to the executive branch of the territorial government. (*Hill v. Territory*, 2 Wash. Ter. 147, 7 Pac. 63.)

We are clearly of the opinion that the act in question is in conflict with the organic law, and therefore void, and that the plaintiff's claim should be audited under the provisions of the act of A. D. 1881. This conclusion has not been reached with-

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 Points decided.
 

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out a careful consideration of the questions presented, and the effect this determination may have upon the object sought to be accomplished by the legislation attempted. The subject of the proposed law is doubtless within the scope of "rightful legislation," but the purpose must be accomplished by constitutional methods. (See Supp. U. S. Rev. Stats., par. 4, p. 559.) It was suggested on the argument, but not urged, that if the "prison commission act" is void, the former act is also invalid. We do not think so. The act of A. D. 1881 does not attempt to create offices, nor to appoint officers, but only confers certain duties upon the governor and treasurer *ex-officio*. This the legislature, doubtless, had the power to do, and under the act of Congress last cited we think might have gone further and provided for what was intended by the last act of the legislature.

For the reasons given, the judgment of the court below is reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings in accordance with this opinion.

Hays, C. J., and Buck, J., concurring.

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(February 15, 1886.)

TOULOUSE ET AL. v. BURKETT.

[10 Pac. 26.]

**EQUITABLE RELIEF—PROBATE PRACTICE.**—In cases purely equitable, and in which purely equitable relief is sought, the cause of action set out in the complaint does not constitute a "claim" which must be presented to the administrator before an action can be maintained under section 138 of our Probate Practices Act.

**FINDINGS NOT SUPPORTED BY EVIDENCE—REVIEWED BY APPELLATE COURT WHEN.**—Errors in findings of fact on the ground that they are not supported by the evidence can only be reviewed in the appellate court on an appeal from an order overruling a motion for new trial.

**PLEADINGS—CLAIM AGAINST ESTATE.**—In actions against an estate it is not necessary to allege in the complaint that the "claim" sought to be collected has been presented to the administrator for his allowance.



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Kingsbury & McGowan and Brumback & Lamb, for Appellant.

A complaint in an action against the administrator of an estate that does not allege that any claim for the amount demanded was presented to the administrator for allowance, and that it was rejected, and that action was commenced within the statutory period after rejection, should be dismissed, as stating no cause of action. (Prob. Prac. Act, secs. 131, 136; Rev. Stats., pp. 265, 267.) And if the question of failure to properly allege and prove these statutory steps is raised in the court below, and the objection is not met by amendment and proof, it is fatal to the action. (*Hentsch v. Porter*, 10 Cal. 558; *Coleman v. Woodworth*, 28 Cal. 569; *Bank v. Howland*, 42 Cal. 134.)

A. F. Montandon, for Respondents.

Findings cannot be impeached for being contrary to the evidence, except by motion for a new trial. (*Pico v. Cuyas*, 47 Cal. 178; *Rice v. Inskip*, 34 Cal. 224.) The decree must stand unless the complaint will not support any judgment. (*Lamkin v. Sterling*, 1 Idaho, 120; *Smith v. Sterling*, 1 Idaho, 128; *Diehl v. Hull*, 1 Idaho, 352.) The nonpresentation of a claim against the estate of a deceased person to the administrator will not necessarily deprive the district court of jurisdiction over the same. (Organic Act, sec. 1868; *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568; *Rosenberg v. Frank*, 58 Cal. 400.) An objection to the complaint that defeats only plaintiffs' present right to recover must be made in the court of original jurisdiction, during the term at which the judgment is rendered, and cannot be made in the appellate court for the first time. (*Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568; *Bank v. Howland*, 42 Cal. 134.)

BUCK, J.—The plaintiffs in this action were partners, doing business as miners, in Alturas county, in this territory, and the owners of certain mines mentioned in the complaint. On the fifteenth day of October, 1881, they executed and delivered to Nicholas Boucher, and to his heirs and assigns, a deed of the undivided one-third of said mines, in consideration of

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\$2,000. The said consideration was not paid at the time said deed was delivered to said grantee, but said indenture of deed contained the stipulation by the grantors that said grantee "agrees to work on said mines, without remuneration, until the same are sold or otherwise disposed of; and should the same be sold, or mineral extracted therefrom be sold, the grantors shall receive the said \$2,000 consideration out of the first money received from said sales over and above the value of said services of grantee." The complaint alleges that said conveyance was made and delivered in pursuance of a contract of partnership between the grantors and grantee therein, whereby the partners were each to own one-third of said mines, and be equal partners in working the same; but through accident and mutual mistake, all of said parties being illiterate and of foreign birth, not understanding the English language, the intended contract of partnership, with condition to convey the one-third interest in said mines, was made to convey said interest absolutely, and without fully stating the terms and conditions of said partnership and of said conveyance; that said grantee received the benefits of said contract with plaintiffs on said mines, worked according to said agreement until August 24, 1882, when a contract of sale of said mines was made; that afterward, the said sale not being made, the plaintiffs and the grantee, Boucher, received \$4,000 forfeit money therefrom, which sum was paid to said Boucher, and by him divided equally between them, the said Boucher retaining therefrom \$1,333.33; that said forfeit was first paid to said Boucher, and one-third retained by him, against the protest of plaintiffs, who claimed the same as a part of the proceeds of the said mines which should be applied on the said purchase price of \$2,000; that, after the receipt of said forfeit money, said Boucher refused and neglected to work on said mines, and left the same, and continued away therefrom until the first day of June, 1883, when he died, and defendant, Burkett, was duly appointed administrator of his estate. The complaint further alleges that the plaintiffs have performed their part of said agreement of sale and partnership, but that neither Boucher nor his representatives have performed their part thereof, but have refused so to do, and still refuse and neglect to fulfill the same; that at the date of the commencement

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of this action there was five hundred and forty-six days' labor due from defendant on said contract. Wherefore plaintiffs pray that said deed be rescinded; that said contract be reformed to comply with the real understanding of the parties; that said defendant, as administrator of the estate of said Boucher, be decreed to reconvey said one-third interest to plaintiffs, and, in case said relief cannot be granted, the vendor's lien on said premises be foreclosed and sold to pay the amount ascertained to be due plaintiffs in consequence of a breach of said contract; that plaintiffs have a personal judgment against defendant for any deficiency; and for such further relief as may be agreeable to equity. The defendant answered the complaint, admitting that plaintiffs were the owners and in possession of said mines, as alleged in the complaint, by a failure to deny the same, and the making and delivery of said deed, but denies all the other material allegations of the complaint, and prays that the suit be dismissed at plaintiffs' costs. The case was tried by the court, and the findings of fact sustain the allegations of the complaint, with the exception of findings that there was no mistake in the execution of the said deed; that the plaintiffs were entitled to two-thirds of five hundred days' labor from said Boucher, or on his behalf, from said mines, and that the said labor is of the value of four dollars per day, amounting to \$1,333.33.

As conclusions of law the court find: 1. "That two thousand dollars is due plaintiffs from said estate of Boucher, and is a lien upon the interest in said mine described in said deed"; 2. "The \$1,333.33 due plaintiffs for labor, as aforesaid, is a part of the purchase price of said mine, and is a valid lien on the same"; 3. "That, by the commencement of this action, the plaintiffs elected to terminate the contract, and that they are not allowed any other or greater sum than is herein allowed for the failure to perform said contract"; 4. "That the \$4,000 forfeit money was received by all the parties, and settled between themselves, and plaintiffs are not entitled to recover the same"; 5. "That upon the sale of the property by the administrator he should settle and discharge the costs of this action, and the sum of \$1,333.33 herein declared to be a lien upon said premises."

The defendant appeals from the judgment, and incorporates in the record a bill of exceptions. In the bill exception is

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taken to several of the findings of fact by the court as being contrary to the evidence; but as no part of the evidence in the court below is brought up in the record, this court has no means of determining the correctness of the findings of fact. It is also well established that exceptions to findings of fact, on the ground that they are contrary to the evidence, can only be reviewed on a motion for new trial. (*Pico v. Cuyas*, 47 Cal. 174; *Rice v. Inskip*, 34 Cal. 224; Code Civ. Proc., sec. 411; Hayne on New Trial and Appeal, sec. 96.)

The second point made in appellant's brief is that the complaint is not sufficient to sustain the judgment, in that it fails to allege that the claim of plaintiffs was presented to the administrator for his acceptance or allowance. (Prob. Act, sec. 128.) Upon this objection it has been held in the adjudicated cases that it is not necessary to allege the presentation and rejection of the claim, but that it may be proven on the trial without such allegation. (*Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568.) It is, however, admitted by respondent that no such evidence was in fact given, and it is insisted that the cause of action, as set out in the complaint, is not a "claim," in contemplation of the probate act.

In *Gray v. Palmer*, 9 Cal. 616, in which very elaborate briefs were prepared, and exhaustive arguments were made, to determine the signification of this term, as used in the statute identical with our own, the court say: "It would seem clear from the different sections of the act, construed together, as well as from the nature and reason of the case, that the words 'claimant' and 'claim' are used as synonymous with 'creditor' and 'legal demand for money.'"

In *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140, a suit to foreclose a mortgage, Judge Field says: "The term 'claims' in the probate act only has reference to such debts or demands against the decedent as might have been enforced in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered."

The adjudicated cases, and the reason of the law, indicate the rule to be as suggested by Justice Field, above cited: that in cases purely equitable, or in which a purely equitable relief is sought, the cause of action set out in the complaint does not

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constitute a "claim" which must be presented to the administrator, under section 138 of our Probate Act, before an action may be maintained. This is held to be the rule in actions for the foreclosure of mortgages and liens where personal judgments over are not sought.

In the case at bar, the plaintiffs were in the possession of the property in dispute, and had a vendor's lien thereon, for the unpaid purchase price. The real object of the suit was to foreclose this lien. It is true, the plaintiffs demanded a personal judgment over against the administrator. The test, however, is not what a litigant demands, but what he is entitled to receive. His prayer for general relief enabled the court to grant such relief as was agreeable to equity.

The only remaining point is that the plaintiff Toulouse was permitted to testify, against the objection of defendant and contrary to section 898, subdivision 3 of our Code of Civil Procedure, as to the ownership and possession of the mines conveyed at the time the deed was made. An inspection of the pleadings shows that such ownership and possession was alleged in the complaint, and not denied in the answer. The testimony referred to could not have injured defendant, as it went to facts admitted in the pleadings.

We find no error in the trial below, and the judgment is affirmed.

Hays, C. J., and Broderick, J., concurring.

PETITION FOR A REARGUMENT.

BUCK, J.—On February 15th, the decision of the court herein was announced, confirming the judgment appealed from. On the 23d the appellant filed his petition for a reargument. As a basis for the petition, it is set out that the court was mistaken in stating that the allegation of ownership and possession of the premises in dispute set out in the complaint was admitted in the answer, by a failure of defendant to deny the same, and on the further ground that the cases of *Gray v. Palmer*, 9 Cal. 616, and *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140, are practically overruled in *Ellis v. Polhemus*, 27 Cal. 354, and in *Pitte v. Shipley*, 46 Cal. 162. The allegation

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of ownership and possession of the premises in dispute are denied in terms, but admitted in fact in the answer. The defendants allege in their answer that the quitclaim deed set out in the complaint contained the exact understanding of the parties, and that there was no mistake or misunderstanding. If this be true, the defendants stand in the relation of vendee of the plaintiffs, the vendors in the deed. This action is brought to foreclose the vendor's lien for alleged unpaid purchase money. In such an action the vendee is estopped from denying his vendor's title. While in some actions the vendee may dispute his vendor's title, the doctrine is (Bigelow on Estoppel, 415) "that, until the grantee has paid for the land, he holds, in respect to the payment, a relation of duty to the grantor similar to that of tenant and landlord. The grantee cannot escape the payment of the purchase price by disclaiming the title of his grantor." In the case at bar the defendant admits that whatever rights he has to the premises he has by virtue of purchase from plaintiffs, and in an action to foreclose the vendor's lien for purchase price, admitting as he does the purchase, the issue is, is there purchase money due? He cannot disavow his vendor's title on that issue. (Bigelow on Estoppel, 414.) The effect, therefore, of the defendant's answer is to deny the plaintiffs' allegation of ownership in form, and to admit it in fact.

It is claimed in the petition, also, that the California cases cited in support of our decision as to the word "claim" have been substantially overruled in later cases. In support of this statement the petitioner cites *Ellis v. Polhemus*, 27 Cal. 354, and *Pitte v. Shipley*, 46 Cal. 162. The signification of this term has been under discussion in the California courts since 1858; commencing with *Gray v. Palmer*, 9 Cal. 616, and continued in *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140; *Ellis v. Polhemus*, 27 Cal. 354; *Christy v. Dana*, 34 Cal. 553; *Sichel v. Carillo*, 42 Cal. 505; *Pitte v. Shipley*, 46 Cal. 155; and *Estate of McCausland*, 52 Cal. 568. Much that has been said in the discussions of this question has been outside of the issues. We find in them nothing to change our opinion upon this question at issue. It is evident that the courts of that state do not understand that the cases referred to have been overruled. In

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Argument for Appellant.

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*Estate of McCausland*, above cited, the court say: "In *Fallon v. Butler*, Mr. Chief Justice Field said: 'Whatever signification there may be attached to the word "claim," standing by itself, it is evident that in the Probate Act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime, by personal action, for the recovery of money, and upon which only a money judgment could have been rendered.' " This definition, they say, "in our opinion, is correct."

We are unable to see that any benefit would arise by a reargument of the case, and the prayer of the petitioner is therefore denied.

Hays, C. J., and Broderick, J., concurring.

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(February 15, 1886.)

CEDERHOLM v. LOOFBORROW ET AL.

[9 Pac. 641.]

**FORECLOSURE OF CHATTEL MORTGAGE—SECOND ACTION FOR CLAIM AND DELIVERY PENDING.**—Where an action to foreclose a chattel mortgage has been commenced, and is pending, a second action for claim and delivery by same plaintiffs cannot be maintained. *Held*, such an action rightfully dismissed at plaintiffs' costs.

**APPEAL** from District Court, Alturas County.

Kingsbury & McGowan, for Appellant.

Goods are not in custody of the law until in possession of some officer or servant of a court under or by virtue of some writ or order. (6 *Wait's Actions and Defenses*, p. 617; *Buckley v. Buckley*, 9 Nev. 379.) The goods not being *in custodia legis*, an action of replevin was the proper remedy and the one provided by the code. (Idaho Code, c. 16; *Wells on Replevin*, sec. 16; *Jones on Chattel Mortgages*, sec. 442.)

L. Vineyard, for Respondent.

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Opinion of the Court—Hays, C. J.

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HAYS, C. J.—Defendants gave plaintiff a chattel mortgage which became due on the first day of December, 1884. On the fourth day of December, plaintiff commenced an action to foreclose the same. On the next day he demanded possession of the mortgaged property, which was refused. Three days later he brought an action of claim and delivery for possession of the property. Defendants answered in each suit. The causes coming on to be heard were consolidated for the purpose of trial, and then, by consent, were referred to a referee to take testimony, make findings of fact and conclusions of law, and to report such judgment as he deemed proper and just. Afterward, the referee filed his report, wherein he finds as facts that the plaintiff was authorized to take possession of the mortgaged property at the time demand was made; that demand was made for possession of the property and possession refused; that at the time of demand there was due and unpaid on the mortgage \$365.18. The referee reported in his conclusions of law that decree of foreclosure be entered for the amount due on the mortgage and order of sale of mortgaged property; that the second action for the possession being brought while the property was under the control and jurisdiction of the court in the former action, and under circumstances which would prevent the plaintiff from using the possession of said property for the only purpose for which he had any right to the possession, to wit, to sell the same, should be dismissed at plaintiff's costs without returning the property, as it appears to be in possession of the officer whose duty it will be to sell the same under the equitable decree to be rendered and entered herein. Judgment was entered in accordance with the conclusions of the referee, from which judgment for costs the plaintiff appeals to this court.

Section 468 of our code provides: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property." Section 341 of the code provides for the appointment of a receiver in action to foreclose mortgages. It is evident the legislature intended to do away with a multiplicity of actions, as they have fully provided for the protection of all rights in one suit; and where the plaintiff, as in this case, chose to



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Points decided.

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enforce his rights by foreclosure, that action becomes exclusive. (*Eastman v. Turman*, 24 Cal. 382.)

The plaintiff's remedy in the first suit was full and complete. He was not only entitled to have a foreclosure of the equity of redemption and a sale of the chattels, but, also, to have the property fully protected from conversion or destruction until the same should be sold. (*Freeman v. Freeman*, 17 N. J. Eq. 44; 3 Wait's Actions and Defenses, 423.) If plaintiff failed to ask for sufficient relief in his foreclosure proceedings, that was a fault of which he cannot complain. We are aware that it has been held in many states that the two actions could be maintained, but we think they did not have such statutory provisions as are found in this territory. (Jones on Chattel Mortgages, sec. 758, and cases there cited.)

For these reasons we think the second action was rightfully dismissed at plaintiff's costs, and the judgment should be affirmed.

Buck and Broderick, JJ., concurring.

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(March 3, 1886.)

## PEOPLE v. BERNARD

[10 Pac. 30.]

**CRIMINAL PRACTICE—INSTRUCTIONS.**—Under the Criminal Practice Act the trial court, in charging the jury, may state the evidence and declare the law.

**SAME.**—The entire charge on a particular point must be considered in determining whether or not it is misleading.

**SAME.**—The instructions herein examined and held not prejudicial to the defendant.

**APPEAL** from District Court, Nez Perces County.

Brumback & Lamb, for Appellant.

D. P. B. Pride, Attorney General, for the People.

No briefs on file.

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Opinion of the Court—Broderick, J.

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BRODERICK, J.—The defendant was accused of the murder of John J. Enright, was tried, and convicted of manslaughter, and sentenced to hard labor in the territorial prison for eight years. From this judgment he appeals. The first point made on his behalf on the appeal is that the court erred in giving the jury the following instruction: "Evidence has been given tending to show that the deceased, John Enright, entered the printing office of the defendant for the purpose of taking therefrom his blankets, and that while there he addressed to defendant certain language which you remember, and thereupon the defendant got down from the printing stool and ordered him, Enright, out of his office; that said Enright not going on such order, the defendant fired his revolver at him, and inflicted upon the deceased the wound from which he died." The criticism on the foregoing instruction is on the latter part of it; that is, it is claimed the court erred in saying to the jury: "The defendant fired his revolver at him, and inflicted upon the deceased the wound from which he died." Under our statute (Criminal Practice Act, sec. 354) the court, in charging the jury, may state the testimony and declare the law; this is what was here done. We cannot by any rule of law subdivide this instruction in the manner contended for, but we must take and consider the entire paragraph, and thus determine whether or not it was misleading. Certainly, under our practice and the circumstances of this case, it was not error for the court to tell the jury that there was evidence tending to prove the facts as stated in this instruction.

The second alleged error complained of is the giving of the following instruction: "There must be danger of personal injury, or the fear of personal injury, to that extent that the only means to avoid the loss of life, or great personal injury, is to kill the assailant." Section 26 of crimes act fully warrants this instruction. Had this section of the statute been copied and given as an instruction, the defendant would have had as good ground for complaint as he has against the one given and here objected to.

The third and last alleged error complained of is in giving the following portion of an instruction: "And that he had in good faith endeavored to decline any further struggle before

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Points decided.

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the fatal shot was fired." It is apparent from the reading that this is not a full or complete sentence. It is selected and taken from a charge which, in the main, is unobjectionable. As the facts appear to us, these lines might have been omitted from the paragraph, but we are unable to see how any substantial right of the defendant could have been prejudiced by them. The meaning of the court below cannot be fairly ascertained by a partial view of what the jury was told was the law by which they should be governed in determining a question of fact. To arrive at such meaning we must look at the entire charge upon the point to which it relates. This rule is recognized in numerous decisions. (*People v. Nelson*, 56 Cal. 81, and cases cited; *People v. Welch*, 49 Cal. 182; *People v. Doyell*, 48 Cal. 93; *United States v. Snow*, 4 Utah, 280, 9 Pac. 501.) Section 482 of the Criminal Practice Act provides that we must give judgment here without regard to technical error or defects which do not affect substantial rights. The statute authorizes the entire instruction from which the words objected to are taken to be given in a proper case, and we understand that it is supported by the general doctrine. (Wharton on Homicide, 485, and cases there cited.)

From an examination of the evidence and the entire record we are satisfied the defendant could not have been injured by these instructions, or either of them, and that he had a fair trial, and was rightly convicted. Judgment affirmed.

Hays, C. J., and Buck, J., concur.

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(March 3, 1886.)

SALT LAKE BREWING COMPANY v. GILLMAN ET AL.

[10 Pac. 32.]

**PRACTICE—APPEALS FROM JUSTICE COURT—JURISDICTIONAL PREREQUISITES.**—To effectuate an appeal from a judgment of a justice of the peace three things are required: The filing of the notice of appeal with the justice; the service of a copy of the same on the adverse party, and the filing of the undertaking; and all these things must be done within thirty days after the rendition of the judgment and are jurisdictional prerequisites; but the mere order in which they are done is not material.

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Opinion of the Court—Broderick, J.

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**SAME.**—Where judgment was rendered in a justice's court on October 2, 1885, and the notice and undertaking on appeal were filed with a justice on the 8th of the same month, and the notice of appeal was served on the 15th of the same month. *Held*, that the statute was complied with and the appeal well taken.

**SAME—DISTINGUISHED.**—The statute providing for appeals from justice's and probate courts, and the provisions for appeal from district to the supreme court, considered and distinguished.

**QUERY—SUFFICIENCY OF UNDERTAKING.**—Where by accident or mistake the respondent is prevented from objecting to the sufficiency of the undertaking within five days after the filing, may such objection be made at any time a substantial defect is ascertained? Material, but not decided.

**APPEAL** from District Court, Alturas County.

Kingsbury & McGowan, for Appellant.

The notice of appeal must be served before the undertaking is filed. (*Hastings v. Halleck*, 10 Cal. 32; *Hewes v. Carville Mfg. Co.*, 62 Cal. 518; *Shissler v. Crooks*, 1 Idaho, 369; *People v. Hunt*, 1 Idaho, 371; *Clark v. Lowenberg*, 1 Idaho, 654.)

F. E. Ensing, for Respondents.

The order of filing or serving notice of appeal or filing undertaking on appeal is immaterial, so that all the steps necessary to perfect the appeal are taken within the thirty days specified in the statute. (*Coker v. Superior Court Colusa Co.*, 58 Cal. 77; *Hall v. Superior Court El Dorado Co.*, 68 Cal. 24, 8 Pac. 509.) The word may mean "must" or "shall," only in cases where the public interests and rights are concerned, and where the public or third persons have a claim *de jure* that such should be the construction given to the word. (*Newburgh T. Co. v. Miller*, 5 Johns. Ch. 112, 9 Am. Dec. 274; *Malcom v. Rogers*, 5 Cow. 188, 15 Am. Dec. 467; *Martin v. Mayor etc.*, 1 Hill, 547; *Rogers v. Wing*, 5 How. Pr. 50; *New York etc. R. R. Co. v. Coburn*, 6 How. Pr. 223; *Buffalo P. R. Co. v. Commissioners etc.*, 10 How Pr. 239; *Baldwin v. Mayor*, 2 Keyes, 411; *Fisher v. Hall*, 41 N. Y. 424; *Mason v. Fraser*, 9 How. (U. S.) 259; *Supervisors v. United States*, 4 Wall. 446.)

**BRODERICK, J.**—On the second day of October, 1885, the plaintiff recovered judgment against the defendants before a

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Opinion of the Court—Broderick, J.

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justice of the peace in Alturas county. On the sixth day of same month the defendants filed with the justice their notice and undertaking on appeal, and on the fifteenth day of the same month they served upon the plaintiff a copy of the notice of appeal. The transcript and papers on appeal were transferred to the district court, and the plaintiff there moved to dismiss the appeal on the ground that the district court had not acquired jurisdiction of the same, as no undertaking on appeal had been filed since the notice of appeal was served. The motion was overruled and denied, and from the order of the district court the plaintiff appeals to this court.

It is contended on behalf of the plaintiff that the appeal was not taken in the manner required by law, and in support of this proposition we are referred to *Shissler v. Crooks*, 1 Idaho, 369; *People v. Hunt*, 1 Idaho, 371; *Clark v. Lowenberg*, 1 Idaho 654. These decisions were made upon the statute which provides for "appeals in general," or perhaps, more correctly speaking, for appeals from the district to the supreme court. This statute differs essentially from the one we are now called upon to consider and construe, and hence the cases cited, while doubtless correct upon the questions there presented, have no application to the case at bar.

By section 665 of the Code of Civil Procedure it is provided that "any party dissatisfied with a judgment rendered in a civil action in a probate or justice's court may appeal therefrom to the district court of the county at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party." Section 668 provides in substance that upon receiving the notice of appeal, and on payment of the fees of the judge or justice, and filing an undertaking as required in the next section, and after settlement of the statement, if any, the judge or justice must, within five days, transmit to the clerk of the district court, with the papers in the case, a transcript of the docket entries. By section 669 it is further provided that "an appeal from a justice's or probate court is not effectual for any purpose, unless an undertaking be filed with two or more sureties," etc.

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Opinion of the Court—Broderick, J.

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It may here be observed that this statute, unaided by any other, prescribes the mode or manner of appeal from judgments rendered in probate and justice's courts. Three things are made indispensable: the filing of the notice of appeal, the service of a copy of the same on the adverse party, and the filing of an undertaking; and all these things must be done within thirty days from the rendition of the judgment, and are jurisdictional; but the statute does not prescribe the order in which these several steps must be taken. Here the notice of appeal and undertaking were filed four days after the judgment was rendered. This did not effectuate the appeal until the notice was served as required by law. The notice was served nine days after the filing, and it will be seen that all these acts were done within the statutory time, and we cannot think that the mere order in which they were done is material. It has been, in effect, so held under the statute from which ours was copied. (*Coker v. Superior Court*, 58 Cal. 177; *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 6, 509.)

The plaintiff insists that by reason of the filing of the undertaking on appeal prior to the service of notice that he was denied his statutory right of objecting to the sufficiency of the sureties. It is true the statute provides that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, but we are inclined to believe that this statute is only directory, and that an insufficient undertaking may be objected to when a substantial defect is ascertained, or that the defect or irregularity may be waived. (*Rabe v. Hamilton*, 15 Cal. 32.) It will be seen that the statute does not require notice to be given of the filing of the undertaking; service of notice of appeal is the requirement, and this need not necessarily be done before the undertaking is filed. The statute does not require it. In construing a statute we must look to the language used, and endeavor, if possible, to ascertain the intention of the legislature; and applying this rule to the statute in question we are unable to see that anything more was intended than that the appeal should be perfected within thirty days from the rendition of the judgment.

It may here be observed that no showing was tendered in the court below that on account of accident or mistake the plaintiff

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Argument for Appellants.

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had been deprived of the right to object to the sufficiency of the undertaking. No claim was made that the undertaking was for any reason insufficient, or that any injury would likely result; but the plaintiff rested its application on the cold question of jurisdiction. Whether, if it had chosen to pursue the other course suggested, it would have been availing, we do not here decide. On this question we refer, however, to the following authorities: *Coulter v. Stark*, 7 Cal. 244; *Cunningham v. Hopkins*, 8 Cal. 33; *Rabe v. Hamilton*, 15 Cal. 31; *Stark v. Barrett*, 15 Cal. 364; Hayne on New Trial and Appeal, par. 214, p. 649; Code Civ. Proc., sec. 668.

After as careful consideration of the question presented by this appeal as we have been able to give, we are satisfied that the ruling of the court below was correct. The judgment and order are therefore affirmed.

Hays, C. J., and Buck, J., concurring.

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(March 3, 1886.)

GAFFNEY v. HOYT ET AL.

[10 Pac. 34.]

**PARTNERSHIP—PROOF OF.**—Evidence of common report should only be admitted to prove partnership in connection with the further evidence that such report was known to the parties sought to be charged.

**PRACTICE—NEW TRIAL—MODIFY JUDGMENT.**—The judge of the district court may, upon motion for a new trial on the ground of insufficient evidence to sustain the verdict, modify the judgment by striking out the name of one of the parties defendants where several defendants are severally joined.

**APPEAL** from District Court, Alturas County.

Kingsbury & McGowan, for Appellants.

In a joint action against copartners as such, on a contract, the action must stand as to all or none, and that in such cases the common-law rule is the law. And further, that even under

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Argument for Respondent.

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the code the same rule obtains as to the action. (Parsons on Partnership, 108; 7 Minn. 217 (7 Gill. 159); 1 Minn. 102 (1 Gill. 81); 2 Minn. 210 (2 Gill. 171); 22 Minn. 203; Bliss on Code Pleading, secs. 325, 327; 3 Minn. 106 (3 Gill. 58); 11 Minn. 138 (11 Gill. 87); Hilliard on New Trials, sec. 2, p. 446; Hilliard on New Trials, sec. 13, p. 452; 48 Cal. 438.)

Can the court, without any notice to defendants or any consent of plaintiff, make a new judgment not under the pleadings nor on the verdict? We contend not. (See 39 Cal. 688; 1 Sutherland on Damages, 207; 7 Cal. 443-449; 51 Cal. 184; 1 Dindley on Partnership 482, and notes; Greenleaf on Evidence, sec. 483; Freeman on Judgments, sec. 136; Hilliard on New Trials, sec. 34, p. 153; Hilliard on New Trials, sec. 115, p. 663, and sec. 167, p. 675.) The other defendants whom the judgment is ordered to stand against have a right to object to anyone jointly bound with them being released without any notice to them. (Freeman on Judgments, secs. 231-233; Freeman on Judgments, secs. 43, 44; Freeman on Judgments, sec. 72a; Green's Practice, sec. 1112; *Chase v. Torrey*, 20 Vt. 395; Freeman on Judgments, sec. 104a; 2 Neb. 60.)

Angel & Sullivan, for Respondent.

The court erred in permitting the plaintiff to attempt to establish a partnership between the defendants, Hoyt and Dodge, by testimony of common report by the testimony of the plaintiff, Gaffney, against the objection of defendants. Novation must be express, and it must appear that the original debtor was in express terms released by the creditor and a new debtor substituted in his place. (1 Addison on Contracts, p. 527, and cases cited in note 1; see pp. 531, 532; 1 Parsons on Contracts, p. 219, note "C,"; *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *McLare v. Hutchinson*, 18 Cal. 80; *Lyle v. Schombar*, 23 Cal. 538; *Bonnemer v. Negrete*, 16 La. 474, 35 Am. Dec. 217.) Judgment may be given for or against one or more of several defendants, etc. (See Code Civ. Proc., 351; *Rowe v. Chandler*, 1 Cal. 167; *Ingraham v. Gildernesster*, 2 Cal. 89; *Kritzner v. Warner*, 4 Cal. 231; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, 18 Cal. 402; *Fox v. West*, 1 Idaho, 782.)



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Opinion of the Court—Buck, J.

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BUCK, J.—About July, 1883, M. L. Hoyt & Co., doing business as bankers at Shoshone, Alturas county, Idaho territory, received on deposit of the plaintiff, Bartley Gaffney, \$914.20. Shortly after, to wit, August 3, 1883, the said company sold their said business to Ross Cartee, and gave notice to their depositors to "look to said Cartee for the payment of any money due them from said bank, from the date of said notice." That afterward, the said Cartee having failed, the plaintiff demanded payment of the said firm of Hoyt & Co. of his said deposit, which demand being refused he commenced this action for the amount claimed to be due. The amended complaint was filed July 11, 1884. It alleged the partnership of defendants, the deposit of the money, the demand of payment, and the refusal to pay; and demanded judgment for the amount due, with costs. The defendants filed their answer August 1, 1884, and interpose a general denial. Neither pleading is verified. The cause was tried by a jury, and they returned a verdict for plaintiffs of \$1,027.69, and judgment was entered thereon, against all the defendants, on the third day of July, 1885. The defendants gave notice of motion to set aside the verdict and judgment, and for a new trial, on the ground of accident and surprise, insufficiency of the evidence to sustain the verdict, newly discovered evidence, and because the verdict was contrary to law. On the tenth day of October, 1885, the court granted the motion to set aside the verdict as to Wurtelle, overruled the motion as to the other defendants, and reformed the judgment. From the order overruling the motion for a new trial, and from the modified judgment, the defendants appeal, and incorporate a bill of exceptions to the order overruling the motion for a new trial, and a statement, into the record. In the specifications of errors the appellants assign as error: "1. Insufficiency of the evidence to prove that the defendants were partners; 2. That the evidence was sufficient to establish that the plaintiff consented to change his deposit account from Hoyt & Co. to Cartee; 3. That the court erred in admitting, against the objection of defendants, testimony of common report as to the copartnership of defendants; 4. That the order reforming the judgment is against law."

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Opinion of the Court—Buck, J.

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In the brief of appellant fifteen assignments of error are set out; but, as no errors will be considered on appeal that were not set out in the specifications of error in the statement of the case and in the bill of exceptions, we shall consider only those above enumerated.

The first and third assignments of error, to wit, that the evidence was insufficient to prove that the defendants were partners, and error in admitting evidence of common report to prove partnership, may be considered together. The rule seems to be established, as the result of numerous adjudicated cases, that common report can only be admitted to prove the partnership of the different members of a firm when it is accompanied with evidence that such report was known to the party sought to be charged. (5 Wait's Actions and Defenses, 114, and numerous cases there cited; *Bowen v. Rutherford*, 60 Ill. 41, 14 Am. Rep. 25; *Brown v. Crandall*, 11 Conn. 92; *Halliday v. McDougall*, 20 Wend. 81.)

In the case at bar, the admission of Hoyt, in his deposition introduced in evidence, and the admission of Wallace as testified to by Mr. Angel, were sufficient to justify the verdict of the jury as to their partnership. Parties plaintiff are not held to the same degree of strictness in proving the partnership of defendants as they are in proving their own partnership when they bring the action as partners. As to defendants Dodridge and Wurtelle there seems to have been no evidence of their connection with the firm except common report, and indeed Wurtelle seems to have been unconnected with the firm even by common report. While this evidence was competent, yet, without the additional evidence that the report was known to Dodridge and Wurtelle, we think it was not sufficient to warrant a judgment against them.

Upon the hearing of the motion for a new trial the court set aside the verdict and judgment as to Wurtelle, and overruled it as to the other defendants. It is insisted by appellants that it was error to modify the judgment by striking out one of the parties. The defendants, by their answer, put in a general denial, and thus deny the partnership, and also their several liability. They are in no way jointly interested in their defense. Upon their motion for a new trial they severally

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Opinion of the Court—Buck, J.

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insist that the evidence is insufficient to establish either their joint liability as partners, or their several liability as individuals. The court, in its discretion, sustained the motion as to defendant Wurtelle, and overruled it as to the others. Section 352 of the Code of Civil Procedure, provides "that in actions against several defendants the court may, in its discretion, render judgment against one or more of them." It is claimed upon the argument that thus diminishing the number of defendants increases the burden of those remaining; but defendants themselves deny joint as well as several liability. If they were not partners with defendant Hoyt, they should not be held. The burden should rest upon him and his partners. If any of the defendants were likely to be prejudiced through the want of evidence on the part of plaintiffs to prove who all of the partners were, the defendants were in a position to furnish the evidence as to the actual members of the firm, and thus distribute the burden where it rightfully belongs. We think the court below had authority to modify the judgment. (*Matheson v. Grant*, 2 How. 279.)

The next alleged error is the overruling of the motion for a new trial on the ground of newly discovered evidence. Evidence was admitted by defendants tending to show that plaintiff drew two checks upon Mr. Cartee after Hoyt & Co. had transferred their interest in the bank, and it is claimed that the drawing of said checks was evidence showing that the plaintiff accepted said Cartee for said deposits, and thus released Hoyt & Co. The plaintiff, in rebuttal, denied the signing of said checks, which evidence defendants claim was surprise to them, and they produced the affidavit of said Cartee, on the motion for new trial, to the effect that he (Cartee) would testify that plaintiff, Gaffney, actually signed said checks. The answer contains no allegation that plaintiff accepted said Cartee, and released Hoyt & Co. from said deposit. The answer contains a simple denial of the partnership, the deposit, the refusal to pay and the indebtedness. These constitute the issues. Evidence of release of Hoyt & Co. and acceptance of Cartee would be entirely outside of the issues, and therefore irrelevant and inadmissible. Clearly it was not error to refuse a new trial

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Argument for Appellants.

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upon the discovery of evidence entirely irrelevant to the issues made by the pleadings.

An inspection of the evidence shows that there was no testimony of the liability of either Wurtelle or Dodridge, except that of common report, which was not of itself sufficient to justify the verdict against them. (*Ah Lep v. Gong Choy*, 13 Or. 205, 9 Pac. 483.)

We think the judgment should be further modified by striking therefrom the name of Dodridge as defendant, and affirmed as to defendants Hoyt and Wallace, and that the cause be remanded for a modification in the court below in accordance herewith.

Hays, C. J., and Broderick, J., concurring.

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(March 3, 1886.)

HOUSER ET AL V. AUSTIN ET AL.

[10 Pac. 37.]

**PRACTICE—SUBMISSION OF ISSUES IN EQUITY.**—In equity it is within the discretion of the court to submit both legal and equitable issues to the jury at the same time.

**REFORMATION OF CONTRACT.**—To authorize the reformation of a written contract on the ground of mistake, the evidence must leave no reasonable doubt in the mind of the court as to the mistake. The mistake must be mutual, and it must appear that both have done what neither intended.

**EVIDENCE.**—Where a person is proved to have caused a witness to have absented himself from the trial, the presumption arises that the evidence of the witness, if given, would be against his interest.

APPEAL from District Court, Alturas County.

Huston & Gray and R. Z. Johnson (John T. Morgan, of Counsel), for Appellants.

The court erred in submitting to the jury the special issues before the equitable issues in the action had been disposed of, and before the right of respondents to recover, or to any dam-

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Argument for Appellants.

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ages or relief had been determined. (*Webber v. Marshal*, 19 Cal. 457; *Lestrade v. Barth*, 19 Cal. 660, 671; *Arguello v. Edinger*, 10 Cal. 160; *Harrison v. Jeneau Bank*, 17 Wis. 361; *Estrada v. Murphy*, 19 Cal. 249, 272, 273.) Courts of equity will not reform written instruments unless the mistake or fraud alleged is admitted or proved beyond a reasonable doubt. (2 Pomeroy's Equity Jurisprudence, sec. 859, and note, p. 326; *Siocbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; S. C., 107 Mass. 316, 317; 1 Sugden on Vendors, sec. 11, pp. 212-215; *Sawyer v. Hovey*, 85 Mass. (3 Allen) 331, 333, 81 Am. Dec. 659; *Lyman v. United Ins. Co.*, 17 Johns. 373; *Nevins v. Dunlap*, 33 N. Y. 680; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 563; *Hearne v. Marine Ins. Co.*, 20 Wall. 490; *Howland v. Blake*, 97 U. S. 626; *Ivinson v. Hutton*, 98 U. S. 82; *Insurance Co. v. Nelson*, 103 U. S. 544, 548; *Andrews v. Essex Ins. Co.*, 3 Mason, 10, Fed. Cas. No. 374; *United States v. Munroe*, 5 Mason, 557, Fed. Cas. No. 15, 835; 1 Story's Equity Jurisprudence, secs. 152, 157; *Spare v. Home Ins. Co.*, 9 Saw. 154, 19 Fed. 14; *Lestrade v. Barth*, 19 Cal. 661, 675; *Levins v. Lazzarovich*, 55 Cal. 52, 54; Kerr on Fraud and Mistake, 421, 422.) Conduct or representation to work an estoppel must be with knowledge of the facts by the party sought to be estopped. (*McGarrity v. Byington*, 12 Cal. 431; *Morrison v. Caldwell*, 5 T. B. Mon. 425 17 Am. Dec. 84; *Stuart v. Luddington*, 1 Rand. 403, 1 Am. Dec. 550; *Brewer v. Boston etc. R. R. Co.*, 5 Met. 478, 39 Am. Dec. 694; *Finnegan v. Canaher*, 47 N. Y. 500; Herman on Estoppel, 413, 415, 439; Bigelow on Estoppel, 480, 531, 548; *Reynolds v. Mutual Fire Ins. Co.*, 34 Md. 280, 6 Am. Rep. 337; *Flagg v. Mann*, 2 Sum. 563, Fed. Cas. No. 4847.) The other party must have been ignorant of the truth, and must have honestly relied and acted upon the statement or act which is claimed to work the estoppel. (6 Wait's Actions and Defenses, 684, 685, 694; *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39; Herman on Estoppel, 343; *Steel v. Smelting Co.*, 106 U. S. 456; *Brant v. Virginia Coal etc. Co.*, 93 U. S. 327, 337; *Corning v. Troy Iron etc. Factory*, 40 N. Y. 203.) The alleged admission, act or conduct must have been intended to influence, and must have actually influenced the conduct of the other party. (*Muller*

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*v. Pondir*, 55 N. Y. 325, 334, 335, 14 Am. Rep. 259; *Leland v. Isenback*, 1 Idaho, 469, 475; *James v. Wilder*, 25 Minn. 318.)

Lyttleton Price and Arthur Brown, for Respondents.

When there is a substantial conflict in the evidence the supreme court will not disturb the decision of the court below. (Hayne on New Trial and Appeal, 234, 288, and cases cited; *Doe v. Vallejo*, 29 Cal. 390.) The rule is the same where the degree of proof is beyond reasonable doubt as where a preponderance is enough—as in criminal cases. (*People v. Ashnauer*, 47 Cal. 100; *People v. Manning*, 48 Cal. 335; *People v. Gill*, 45 Cal. 285; *People v. Simpson*, 50 Cal. 304; *People v. Montgomery*, 53 Cal. 577.) If appellants are not entitled to recover upon their whole case, errors in instructions as to respondents' case will not be regarded. (*Enright v. Railroad Co.*, 33 Cal. 233; *Hebrard v. Jefferson Co.*, 33 Cal. 290; *Barth v. Clise*, 12 Wall. 401.)

BUCK, J.—On the fourth day of March, 1884, the plaintiffs filed their complaint herein, alleging that they were the owners as tenants in common of certain mining ground in Alturas county, Idaho territory, known as the "Elkhorn lode"; that on the third day of October, 1883, by an agreement in writing, they authorized and licensed defendants Austin and Ervin and one Grant to work and mine, and take and extract, ore from a certain portion thereof, particularly bounded and described in said agreement, upon terms expressed therein; that defendants Austin and Ervin commenced work thereon under said agreement about the third day of October, 1883; that said Grant made a pretended sale of his interest under said agreement to defendant Ross about the said first day of December, 1883, and claims no interest under the same; that plaintiffs Houser, Holton & Hale were nonresidents of this territory, and plaintiff Lewis was absent therefrom during December, 1883, and January, 1884, and that neither of them had any knowledge of the alleged wrongful acts of defendants set out in said complaint; that about December 1, 1883, defendants fraudulently taking advantage of said license to gain admission to said mines without authority or knowledge of

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Opinion of the Court—Buck, J.

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plaintiffs, or either of them, wrongfully entered upon a certain portion of said Elkhorn mine outside of the boundaries of the ground described in said agreement, and wrongfully removed pay ore therefrom, of the value of \$10,000; that the portion of ground so wrongfully entered upon by defendants is very rich in mineral-bearing ore, and defendants threaten to continue their said trespass to plaintiffs' irreparable injury, and plaintiffs believe they will so do unless restrained by order of the court; that soon after plaintiff Lewis returned to the territory he notified defendants to desist from said trespass, and they refuse so to do; and that defendants are insolvent; and pray that defendants may be enjoined from entering upon such portion of said Elkhorn mine as is outside of the boundaries set out in their said agreement, and for general relief.

The defendants, answering, deny the trespass, and allege the verbal agreement or contract existing prior to the written one set out in the complaint including the ground in controversy; that the written agreement was intended to contain the same, and that the plaintiff Lewis fraudulently informed them that it did contain the same; that he put them in possession of the same, and received the two-fifths of the ore extracted therefrom as per condition of the written agreement; and that defendants accepted said agreement believing that it included the mining ground in dispute. Defendants also file a cross-complaint, alleging that they received said agreement believing and understanding that it contained the ground in dispute; that the plaintiffs so represented to them falsely, and that they relied on said representation. They further allege, among other matters, that they entered upon said premises under said agreement, and discovered a rich body of ore thereon of the value of \$200,000, which they were prevented from extracting by plaintiffs' injunction herein; that plaintiffs had extracted the same and appropriated the same to their use, and that in consequence of said injunction restraining them from working said ore, they had been put to additional expense in the amount of \$2,000, in opening other ore bodies under said agreement; and prayed that said agreement might be so reformed as to include the ground in dispute; that they (defendants) be adjudged owners, and entitled to all the said Elkhorn lode on the dip

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Opinion of the Court—Buck, J.

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thereof having its apex within the premises described in said agreement, and the right to mine and remove the same, and for other and equitable relief.

The plaintiffs, answering, deny the material allegations in the amended cross-complaint, and ask that it be dismissed, at defendants' costs, and for further and equitable relief.

Upon the trial of the case a jury was requested by the defendants to try the cause, and, under objection of plaintiffs, the court impaneled a jury, and of his own motion submitted to them the following special questions: "Q. 1. Did the lessees in the lease, or defendants, enter upon the premises in dispute, and mine and extract ore, with the knowledge, consent, and by authority of plaintiff Lewis, or did they enter without his knowledge, consent, or acquiescence? A. They entered and extracted ore with his knowledge, consent, and acquiescence. Q. 2. Did the plaintiffs, or either of them, by themselves or their agents, receive or retain the two-fifths royalty knowing that the ore was extracted by the defendants and Grant from the premises in dispute? A. They did receive it knowing it to be from the ground in dispute. Q. 3. Did the original verbal agreement for the lease include the premises in dispute, viz., all ground northeast of the east tunnel, and was it omitted from the writing either by mutual mistake or fraud of the plaintiffs? A. It did, and was omitted by mutual mistake. . . . Q. 5. What is the value of the ore the three defendants could have extracted between date of service of injunction, March 8, 1884, and July 1, 1884? A. \$53,160. Q. 6. And what was the extra damage by being driven out, and compelled to drive new tunnels to reach ore? A. \$1,500." To the admission of the last two questions, to wit, 5 and 6, defendants objected on the ground that the equitable issues should be first settled, and assign the submission of all of said questions at the same time to the same jury as error. In support of this alleged error the appellants cite *Weber v. Marshall*, 19 Cal. 457; *Lestrade v. Barth*, 19 Cal. 660; *Arguello v. Edinger*, 10 Cal. 160; *Harrison v. Bank*, 17 Wis. 361; and *Estrada v. Murphy*, 19 Cal. 249. In *Arguello v. Edinger*, *supra*, the action was ejectment, and the issue was whether a verbal contract of sale, with delivery of premises, could be set up as a



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defense thereto. In sustaining such a defense Justice Field says: "If, upon hearing the evidence, the court should determine that there was ground for relief, it would decree specific performance. If it should refuse the relief, it would call a jury to determine the issues upon a general denial." The case was tried, however, upon the general denials, the demurrer to the equitable defense having been sustained. This question of practice was not at issue, and the suggestion of the court was but *obiter*. In *Weber v. Marshall* the action was also ejectment, and the answer contained both legal and equitable defenses. Special issues involving the various issues, legal and equitable, were all submitted to the jury together, against the objection of plaintiffs, who excepted thereto, and saved their exception in the record. The court, by Baldwin, J., say the submission of all these defenses to the jury was irregular; and add that if the equitable and legal matter is not kept distinct, confusion, embarrassment and delay will ensue. They fail to say, however that the doing so is more than irregularity; and state with especial clearness that a new trial is granted for error in the decree based upon the findings of the jury. In *Lestrade v. Barth, supra*, the same issues in an action of ejectment were submitted, and Field, J., says that in *Weber v. Marshall, supra*, such practice was held to be irregular; but as no objection was taken in the court below, the irregularity will not influence the decision in the case at bar. In *Estrada v. Murphy, supra*, the practice does not seem to have been at issue, but Justice Field indicates that it should be, as he had done in *Arguello v. Edinger, supra*. In *Harrison v. Bank*, 17 Wis. 350, an action involving the reformation of a contract, with issues both legal and equitable, submitted to a jury without objection, Dixon, C. J., says that the correct practice in such cases no doubt is to try the equitable cause first, and afterward the legal; but as that practice was not adopted, we see no absolute impracticability in the course pursued.

To the expressions contained in the above authorities it is replied by respondents that the submission of special issues in cases essentially equitable is a matter of discretion with the court; that the findings of the jury thereon are simply advisory, and not binding upon the conscience of the court; and

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that the utmost doctrine of the adjudicated cases is that such a practice is but an irregularity, which has never been adjudged to be sufficient ground to reverse a judgment.

The doctrine of the advisory character of such a practice seems fully determined in *Basey v. Gallagher*, 20 Wall. 678. Justice Field there says, in a case in which the same practice was adopted as in the case at bar: "The court is not bound to call a jury, and if it does call one it is only for the purpose of enlightening its conscience, and not to control its judgment." In *Lestrade v. Barth, supra*, it is said that this practice is only adopted when the evidence is very contradictory and the question turns on the credibility of witnesses. The only reason given why this practice is not proper is that confusion, embarrassment, and delay may ensue. We are unable to see that any of these objections exist in the case at bar. In the only case (that of *Weber v. Marshall, supra*) in which the practice has been actually adjudicated, it was held simply an irregularity not sufficient to justify a new trial. We have graver doubts of the expediency of submitting equitable issues to a jury at all than we have apprehension of confusion or delay in submitting both legal and equitable issues to a jury at the same time. We are of the opinion that the practice rests in the discretion of the court.

The appellants assign as error the giving of the following instruction: "If it is clearly established, to the satisfaction of the jury, that the verbal understanding and agreement of the parties included all the ground lying northeasterly from the east tunnel, and that the same was omitted from the writing by mutual mistake, then the defendants made out a case entitling them to a reformation of the written lease to make it conform to the verbal agreement, and the jury should find on that issue accordingly." This is claimed as error because it does not say that these facts should appear beyond a reasonable doubt. We cannot determine the correctness of an instruction by segregating it from the entire charge, and considering it alone. In the second instruction the court charged the jury that written instruments cannot be reformed upon a probability nor preponderance of evidence, but only upon a moral certainty of error. In the first instructions the jury are told that mis-

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take must appear beyond a reasonable doubt. This is repeated in instruction No. 3. We think the charge is clear and explicit as to the doctrine of reasonable doubt.

The third alleged error is: "The finding of the jury, adopted by the court, that the original verbal agreement for the lease included the ground in dispute, and that it was omitted by mutual mistake, is not supported by the evidence; and that there is no allegation of mutual mistake in the pleadings upon which to base such evidence or finding." We think the allegations in the pleadings are sufficient to sustain the findings, and shall consider the sufficiency of evidence. This seems to be the important question in the case.

In reviewing the evidence we may be aided by segregating the admitted from the disputed facts. Mr. Ervin, the chief witness for the defense, one of the parties defendant, testifies: "I am very familiar with the hill [*the locus in quo*]. Have been around it three years. I first knew east tunnel in May, 1882 [eighteen months before the lease was executed]. Austin had procured a lease which was not satisfactory to us with reference to the ground and the number of men. The ground I wanted was below discovery croppings, which was not included in the first paper. Before the lease was made I had examined only the surface ground. I was acquainted with the other side of the mountain, and tolerably familiar with lessee's tunnel. I asked Lewis to be allowed to work more men, and he said: 'I cannot do this. I have given you all you wanted. You may strike something where you would make \$100 a day,' etc. The restriction on the number of men was all that remained unsatisfactory at the time. Austin was gone five or ten minutes when he went with the paper." I. I. Lewis, one of the plaintiffs, testified "that he gave a lease to Austin, one of the defendants, who after keeping it a week returned with it, and said his partners wanted more ground than was described therein. He [Austin] said they wanted the ground to the east tunnel. I made the erasures in the first paper, and interlined it to read: 'On a straight line from shaft No. 3 to mouth of east tunnel' [as appears in the original lease]. I had copies made of the lease as amended. Austin went away, and on the next day returned with Ervin and Grant. Austin introduced

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Ervin to me. We signed the papers. Ervin remained a short time, and talked about the ground." From this evidence, undisputed, we find that the plaintiffs were particularly anxious to limit the work of defendants to three men, and within a prescribed area; that the matter of the east tunnel as a limit was suggested by Austin, one of the lessees; that the original lease was in the possession of lessees for a week before it was altered; that Austin was familiar with the premises in which the mine was situated, and all of it; that Grant worked on the Elkhorn mine, of which the leased premises were a part; that after keeping the original lease a week, with every opportunity and motive to examine the ground, they had it reformed, extending the original limits; that at the time the reformed lease was delivered to them they were all present; that Ervin remained some time after he had received a copy as amended, and talked about the enterprise with Mr. Lewis; and that he and the other lessees had an opportunity and abundant leisure to examine its contents; and that after all this, as Ervin testifies, the restriction on the number of men was all that remained unsatisfactory at the time.

There is in the record much contradictory evidence. Mr. Lewis swears that the lease was read and compared by the parties, which Mr. Ervin fully denies. But without stopping to weigh conflicting evidence, and accepting the above testimony of Mr. Ervin as true, we may presume that he has omitted nothing which would be of benefit to the defendants' case.

It is argued that the conduct of the plaintiffs in paying money to the witness Grant, with the apparent purpose of hiring him to be absent at the trial, which purpose is not denied or explained by plaintiffs, together with the manner in which the affidavits upon which the injunction was granted were obtained, are presumptions against the plaintiffs' case sufficient to justify the finding of the jury. The sentiments of the court are entirely in accord with those expressed by the attorneys for respondents as to the reprehensible character of such practices. Fortunately for the reputation of the profession, we find no cases in the American Reports where it has been necessary to consider the weight of this class of presumptions in the trial of causes, and we are glad to be able to say that no attorney

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or counsel of record connected with this case is responsible for such a necessity now. Best on Evidence (section 411) says that in the case of *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1430, in which the defendant caused the plaintiff to be kidnapped and sent to sea, and afterward endeavored to take away his life upon a false charge of murder, one of the judges say that these facts spoke more strongly in proof of plaintiff's case than a thousand witnesses. The case was undoubtedly an aggravated one, and the doctrine stated with exceptional force. 1 Phillips on Evidence, \*639, says: "Where a person is proved to have suppressed any species of evidence, the presumption will arise that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance." Applying this rule, and admitting that the evidence of Grant if present would have fully corroborated that of Ervin, we are of the opinion that the facts, as admitted by Ervin and corroborated by Grant, would not be sufficient to authorize the reforming of the lease. The fact that defendants were well acquainted with the ground, and had ample opportunity to know the precise language of the lease—opportunities which they ought to have improved, if they did not—leaves a doubt in the mind of the court, which they think is a reasonable one, that any mistake was made as to the terms of the lease or the premises described in it. In *Hearne v. Insurance Co.*, 20 Wall. 490, the court say: "The party alleging mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt in the mind of the court as to either of these points; the mistake must be mutual and common to both parties. It must appear that both have done what neither intended." To the same effect are *Cox v. Woods*, 67 Cal. 317, 7 Pac. 722; *Mead v. Insurance Co.*, 64 N. Y. 453; *Wachendorf v. Lancaster*, 61 Iowa, 509, 14 N. W. 316, 16 N. W. 533; *Fowler v. Adams*, 13 Wis. 459; *Lake v. Meacham*, 13 Wis. 355; 2 Pomeroy's Equity Jurisprudence, sec. 859; 1 Story's Equity Jurisprudence, secs. 152-157.

The respondents argue that it being admitted that the apex of the ore body in dispute is within the area described in the lease, the lessees have the right to follow the vein outside their

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side lines into the disputed ground. After an examination of the authorities cited in support of this theory, we are of the opinion that the lease gives the defendants a license to remove ore from within the prescribed limits, and does not constitute a grant which authorizes the defendants to follow the vein outside of the area described in the lease.

The appellants urge that the fourth instruction was error, to wit: "If the jury find that Lewis told the lessees that their lease extended to the east tunnel, and the lessees so believing went to work therein with the knowledge of the plaintiffs, and developed an ore body; and that plaintiffs received their royalty from the ore sold therefrom; and that the defendants expended a large amount of labor thereon, so that at the time of the commencement of this suit there was ore of the value of ten thousand dollars on the dump extracted by them—then Lewis and the plaintiffs would be estopped and prevented from claiming that the lease did not include the ground in the east tunnel."

The appellants claim that this instruction is error in that it fails to state that the party to be estopped must have had knowledge that his conduct or representations were false, and that the party claiming the benefit of the estoppel was ignorant of the truth, and honestly relied and acted upon the statement or act which is claimed to work the estoppel. We think the authorities clearly establish that this instruction is error. While under a mutual mistake, under the circumstances of this case, the interest of the defendants in the ore upon the dump at the time they received notice of the mistake would probably be determined by the terms of the lease, yet we think the adjudicated cases would not extend the estoppel beyond that limit. (*Brewer v. Railroad Corp.*, 5 Met. (Mass.) 478, 39 Am. Dec. 694; 6 Wait's Actions and Defenses, 683, 689, 703, 707, 714; *Morrison v. Caldwell*, 5 T. B. Mon. 426, 17 Am. Dec. 84; *McGarrity v. Byington*, 12 Cal. 431; *Stuart v. Ludington*, 1 Rand. 403, 10 Am. Dec. 550, 552; *Finnegan v. Carraher*, 47 N. Y. 500; Herman on Estoppel, secs. 413, 415, 439; Bigelow on Estoppel, secs. 480, 531, 548; *Reynolds v. Insurance Co.*, 34 Md. 280, 6 Am. Rep. 337; *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39; *Steel v. Smelting Co.*, 106

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U. S. 456, 1 Sup. Ct. Rep. 389; *Brant v. Iron Co.*, 93 U. S. 326; *Corning v. Factory*, 40 N. Y. 203.)

Judgment reversed and cause remanded for a new trial.

Hays, C. J., concurring.

Broderick J., expressing no opinion.

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(March 5, 1886.)

SETTLE ET AL. v. WINTERS ET AL.

[10 Pac. 216.]

**TIME ESSENCE OF CONTRACT.**—While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties.

**SAME—AS TO MINING PROPERTY.**—Where the character of the property is such that it is liable to sudden fluctuation of value, time is of the essence of the contract. This rule is especially applicable to mining property.

**APPEAL** from District Court, Alturas County. Affirmed.

Bennett, Harkness & Kirkpatrick (Sutherland & McBride, of Counsel), for Appellants.

It is immaterial that the parties call the contract a lease if it shows a sale was intended. The intent is to be gathered from the whole instrument, and, when so ascertained, it is to be carried out, though the name given to it and particular clauses tend to show a different intent. (*Chase v. Bradley*, 26 Me. 531; *Merrill v. Gore*, 29 Me. 346; *Warren v. Merrifield*, 8 Met. (Mass.) 96; *District Tp. v. Dubuque*, 7 Iowa, 275; *Salmon Falls Mfg. Co. v. Portsmouth Co.*, 46 N. H. 249; *Heryford v. Davis*, 102 U. S. 235, 243, 244; *Nightingale v. Barends*, 47 Wis. 389, 2 N. W. 767; *Aqueduct Corp. v. Chandler*, 9 Allen, 167; *Müller v. Steen*, 30 Cal. 403, 89 Am. Dec. 124; *Diggle v. Boulden*, 48 Wis. 477, 485, 4 N. W. 678.) A covenant to convey on payment of a sum of money is binding, and will be specifically enforced on acceptance of the one to whom the

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covenant is made, although, by the terms of the contract he does not bind himself to pay the money. (*Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485; *Willard v. Tayloe*, 8 Wall. 557; *Ewins v. Gordon*, 49 N. H. 444; *Barnard v. Lee*, 97 Mass. 92.) It is enough that the parties have mutually agreed that their respective acts shall be done at or before a day named, or that the defendants' undertaking is in the form of a bond, and the condition requires certain acts to be done after or contemporaneously with some act to be done by the obligee. (*Steele v. Branch*, 40 Cal. 3; *Moots v. Scriven*, 33 Mich. 500; *Gibbs v. Champion*, 3 Ohio, 335; *D'Arras v. Keyser*, 26 Pa. St. 249; *Edgerton v. Peckham*, 11 Paige, 352; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57.) The vendor cannot tract default alone as terminating the contract, but he must give prompt and unequivocal notice, and make demand. (*Miller v. Steen*, 30 Cal. 403, 89 Am. Dec. 124; *DeCamp v. Feay*, 5 Serg. & R. 323, 9 Am. Dec. 372; *Edgerton v. Peckham*, 11 Paige, 352; *Leaird v. Smith*, 44 N. Y. 618; *Clark v. Lyons*, 25 Ill. 105.) Performance, or an offer to perform, is a condition precedent to the right of either party to insist upon performance by the other. (*Leaird v. Smith*, 44 N. Y. 618; *Crabtree v. Levings*, 53 Ill. 526; *Swan v. Drury*, 22 Pick. 485; *Warren v. Wheeler*, 21 Me. 484; *Howe v. Huntington*, 15 Me. 350.)

Richard Z. Johnson (Huston & Gray, of Counsel), for Respondents.

Where time is of the essence, the stipulation of the contract must be complied with. (Pomeroy's Specific Performance of Contracts, secs. 399, 401.) Parol is admissible to show that, at the time of the making of the contract, time was understood and considered to be of the essence of the contract. (*Nokes v. Kilmorey*, 1 De Gex & S. 444; *Thorington v. Smith*, 8 Wall. 1; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; *Sargent v. Adams*, 3 Gray, 72, 63 Am. Dec. 718; *Gerrish v. Towne*, 3 Gray, 82; *Almgren v. Dutilh*, 5 N. Y. 28.) Specific performance of a contract will not be decreed when there is a want of mutuality. (*Marble Co. v. Ripley*, 10 Wall. 340; *Kerr v. Purdy*, 51 N. Y. 629; *Magoffin v. Holy*, 1 Duvall, 95;



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*Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Green v. Covillaud*, 10 Cal. 330, 70 Am. Dec. 725.) One who is bound to convey on the payment to him of the purchase price of lands is not required to demand such payment, and may stand on the defensive until it is tendered to him, and cannot be deemed in default in the absence of such tender. (*Ten Eick v. Simpson*, 1 Sand. Ch. 250; *Goodale v. West*, 5 Cal. 339.) Where a vendee of land has obtained possession from the vendor under a contract of purchase, if he refuses to pay the purchase money, and accept the vendor's title, he must surrender the possession; and this, although the vendor has not a good title. (*Gilpin v. Watts*, 1 Colo. 479; *Tewksbury v. Magraff*, 33 Cal. 237; *Williams v. Morris*, 95 U. S. 455; *Peralta v. Ginocchio*, 47 Cal. 460; *Sawyer v. Sargent* (Cal.), 7 Pac. 120.)

On the nineteenth day of September, 1882, the respondents, who are the plaintiffs herein, entered into a contract in writing with the appellants, who are the defendants herein, as follows: .

"This indenture of lease, with privilege of purchase, made and executed this nineteenth day of September, A. D. 1882, by and between G. F. Settle and Jacob Reeser, of Rocky Bar, Alturas county, Idaho territory, parties of the first part, and John Winkelbach, of said Rocky Bar, and John B. Winters and F. Ganahl, of the town of Hailey, I. T., parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of one dollar to them in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, as follows, to wit: The said parties of the first part, hereby grant, demise, and lease to the said parties of the second part the following described property, situate, lying, and being near Rocky Bar, Alturas county, I. T., to wit: All of that certain quartz lode mining claim known as the 'Vishnu,' and consisting of an undivided eight hundred feet; also all of that certain quartz lode mining claim consisting of fourteen hundred (1400) feet on that certain vein of quartz containing the precious metals known as the 'Idaho,' and being the discovery claims on said Idaho ledge; also twelve hundred

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(1200) feet on the Golden or Sierra quartz lode; also twelve hundred (1200) feet more or less, on the Chauncy quartz lode or mine; also the 'Montana Tunnel' and tunnel right. All of the above mines and quartz lode claims commence at Quartz gulch, and run thence easterly toward Dixie gulch—the 'Vishnu,' eight hundred feet (800;); the 'Idaho,' fourteen hundred feet (1400;); the 'Sierra' or 'Golden,' 1,200 feet; and the Chauncy, 1,200 feet, more or less—and are situated on the north side of Bear creek, on Idaho hill. Also four hundred feet (400) in the Wizzard King quartz lode, commencing at Dixie gulch, and running westerly four hundred feet; also the millsite at the mouth of Quartz gulch, with blacksmith-shop and cabin thereon. All of the above-described property being situate at the upper end of Rocky Bar, in Bear Creek mining district, Alturas county, Idaho territory; the 'Vishnu' being highest on Idaho hill, and below it the Idaho, and next below the Golden or Sierra and the Chauncy, being all the group of mines on said Idaho hill south of Quartz gulch. Also that certain engine and boiler, known as the 'Idaho Engine and Boiler,' now lying on said Idaho millsite. From the twenty-seventh day of November, 1882, on the expiration of a certain lease of the Vishnu and Idaho mines, executed and delivered by the parties of the first part to Thomas Kitto, Charles Davey, and S. Parkinson; or, in the event of the assignment of said lease to the parties of the second part before the said twenty-seventh day of November, 1882, then from the date of such assignment until the twenty-seventh day of November, 1883, upon the following terms and conditions: The said parties of the second part, so long as they shall deem fit to hold said property, and to mine and extract ore therefrom, and to pay the said parties of the first part one-half of the gross proceeds in manner hereinafter specified; and when the sum of forty thousand dollars (\$40,000) shall have been paid, either out of the proceeds of the mine or otherwise, by the said parties of the second part to the parties of the first part—the said parties of the first part hereby covenant and agree, for themselves, their executors and administrators and assigns, to and with said parties of the second part, their heirs and assigns, to convey to them by good and sufficient deed

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all of the above-described property, free and clear of all encumbrance, upon such payment, provided the said sum of forty thousand dollars (\$40,000) shall have been paid on or before the twenty-seventh day of November, 1883. And the said parties of the second part hereby covenant and agree to enter upon said properties, and to mine and extract ore from the same so long as they shall find it profitable; to do the work in a proper and workman-like manner, and at their own cost and expense; and to hold and keep said property free and clear of all costs, charge, or lien for the working of the same; and out of the gross proceeds of said mines to pay one-half thereof, as fast as taken out, to said parties of the first part, in a manner hereinafter specified; and, upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said twenty-seventh day of November, 1883, the said sum of forty thousand dollars (\$40,000) shall have been paid; and in the event of the said parties of the second part, or their assigns, failing to comply with either or any of the foregoing covenants, or any covenant, promise, or thing herein contained, on their part to be done, kept, or performed, that then it shall be lawful for said parties of the first part to re-enter, possess, and enjoy the above-described property and premises, and every part thereof; and the said parties of the second part hereby agree, in the event of such nonperformance on their part, to surrender possession of the said premises upon demand by said parties of the first part claiming their right to re-enter.

“It is hereby mutually covenanted and agreed by and between the parties to this instrument that the said parties of the first part shall have the right, at all times, of inspecting the said mines above described, and all mining operations and work thereon; that the said parties of the second part shall have the right, at any time, to stop work on said mines when they shall find or deem the same unprofitable; that, in working said ores, at each clean-up the said parties of the second part shall and will furnish a true account of all ores extracted and milled, and all bullion received, to the said parties of the first part; that, in milling said ores so taken from said property, the said

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parties of the first part, if they so desire, shall have an equal right with said parties of the second part in milling the ores, cleaning and retorting the same, weighing and storing the bullion, until the said parties of the second part receipt to them for one-half the gross proceeds, it being expressly understood that upon each clean-up the said parties of the second part are to receipt to the said parties of the first part that they own one-half of the same, and that the said parties of the second part hold the same for them; and the said parties of the second part are then to dispose of the bullion to the best advantage, and to pay to the parties of the first part one-half of the proceeds thereof in money, currency, or coin; and upon such payment the parties of the first part will credit said purchase price of forty thousand dollars (\$40,000) with the sum so received; and, lastly, that in no event shall the said properties above described, or any part thereof, be held for any claim, cost, charge, or lien for working the same by the said parties of the second part under this instrument, but that all such work shall be done at the expense of the said parties of the second part solely and alone; and the said parties of the first part, for themselves, their executors, administrators, and assigns, hereby covenant and agree, to and with the said parties of the second part, their heirs and assigns, to convey, by good and sufficient deed, all of the above-described properties, free and clear of all encumbrances, to them, the said parties of the second part, or their assigns, at any time, upon the payment to them, the said parties of the first part, of the sum of forty thousand dollars (\$40,000) either out of the proceeds of the mines or otherwise, on or before November 27, 1883, in the manner hereinbefore specified by the said parties of the second part, or their assigns. And it is hereby expressly and mutually covenanted and agreed that this covenant shall be taken, held, and deemed a covenant real, running with and binding the land. In witness whereof the said parties have hereunto set their hands and seals this nineteenth day of September, 1882.

(Signed) "GEO. F. SETTLE. [Seal]  
"JACOB REESER. [Seal]  
"JOHN WINKELBACH. [Seal]  
"JOHN B. WINTERS. [Seal]  
"F. GANAHL. [Seal]

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"Signed, sealed, and delivered in the presence of  
"SOL. NEWCOMER."

At the same time the following instrument in writing was executed by appellants and delivered to the respondents:

"We, the undersigned, in consideration of the execution and delivery to us of a certain lease with the privilege of purchase of the 'Vishnu' and 'Idaho' mines, and of other property, of even date herewith, by G. F. Settle and Jacob Reeser, hereby covenant and promise to have each and every man employed by us in working said mines to sign the following contract, viz: 'In consideration of my being employed by John Winkelbach, J. B. Winters, and F. Ganahl, the lessees of the "Vishnu," "Idaho," and other mines, I hereby covenant and agree to look alone to said lessees for my pay, and hereby waive all rights or claim that I may have in law or equity against the property, or the owners thereof, G. F. Settle and J. Reeser.'

"Witness our hands and seals this nineteenth day of September, 1882.

(Signed) "F. GANAHL.

"JOHN WINKELBACH. [Seal]

"JOHN B. WINTERS. [Seal]

"Signed, sealed, and delivered in the presence of  
"SOL. NEWCOMER."

Soon after the execution of this contract the defendants bought in the Kitto lease mentioned in the contract at an expense of about \$5,000, and entered into possession of the properties, and began work thereon, and extracted a large amount of ore.

On the twenty-fourth day of November, 1883, the parties further agreed, in writing, as follows:

"In consideration of the extension of the time of the above instrument until and including December 27, 1883, we hereby consent and agree to take a deed for 1,367 and one-sixth feet of the Idaho ledge instead of 1,400 feet, as covenanted in the above instrument, and to pay interest at one per cent per month on the balance of the purchase money from now until December 27, 1883, or any time it is paid prior to that date.

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"Witness our hands and seals this twenty-fourth day of November, 1883."

(Signed) "F. GANAHL.  
"JOHN WINKELBACH.  
"JOHN B. WINTERS.

"In consideration of the above covenants, we hereby extend the time on the within instrument until and including December 27, 1883.

"Witness our hands and seals, this twenty-fourth day of November, 1883.

(Signed) "GEO. F. SETTLE. [Seal]  
"By V. S. ANDERSON.  
"J. REESER. [Seal.]"

That prior to the twenty-seventh day of December, 1883, defendants paid over to plaintiffs \$20,075.04, and on the twenty-ninth day of December, 1883, they paid over \$948.96, making in all \$21,024, as one-half gross proceeds of ore taken out before the twenty-seventh day of December, 1883; and they continued to work a portion of the said mines until the service of injunction in this action, on the eleventh day of February, 1884, the same having been commenced February 4, 1884. Defendants extracted ore from said mines during the time they worked it to the amount of over \$42,000. It is claimed by the plaintiffs that they demanded possession of this property in dispute about the twenty-second day of January, 1884. This is denied by defendants. The trial court found that the demand was made.

The plaintiffs brought this action to restrain defendants from further interfering with the premises in dispute, and for an accounting. The defendants answer the same, and also file a cross-complaint, wherein, among other things, they allege the making of the contract; that the same was for the sale of the said premises; that a further extension thereof has been granted; that the same is still in force; and that they have exercised the option to purchase, and paid, as part purchase money thereon, the sum of \$21,024; that they had paid out for the Kitto lease \$5,000, and the further sum of \$34,000 in working and improving the mine; that the defendants were

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Statement of Facts.

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ready, willing, and desirous to complete the contract, and receive the deed, and pay the balance of the purchase money thereon, and had tendered the same to the plaintiffs; that plaintiffs are unable to comply with their part of the contract; that defendants had greatly enhanced the value of the property; that they had expended a large amount of money between the twenty-seventh day of December, 1883, and the commencement of this action; and ask for a specific performance of the contract so far as plaintiffs were able; and that they be enjoined from interfering with the property.

The plaintiffs answer the cross-complaint, and, among other things, deny that defendants exercised any option to purchase. They allege that the work done by defendants was on the "Vishnu" mining claim; deny that defendants have expended a greater sum than one-half the net proceeds of the ore taken out; deny the enhancing of the value of the mine; and allege that defendants have taken from the mine ore of the value of \$45,000. Plaintiffs aver that the money paid by defendants was for rent or royalty, under the terms of the lease, and not otherwise, and is less than one-half of the proceeds of ores taken out. Plaintiffs deny that the option to purchase has in any manner been extended beyond the twenty-seventh day of December, 1883; and allege that all work done after said date was by the wrongful act of the defendants, and without plaintiffs' consent; and allege that on the twenty-second day of January, 1884, they demanded possession of the property. They allege that they were ready, able and willing at all times, up to the twenty-eighth day of December, 1883, to comply with the terms of the contract; and that defendants knew plaintiffs' title at the time of making the contract. Plaintiffs further allege that the contract was drawn by one of the defendants, Frank Ganahl, who was an attorney of this court; that there was no other attorney that could be procured; and that said Ganahl represented, promised and claimed that time was of the essence of the contract; that if the whole sum of \$40,000 was not paid at the expiration of the contract, then defendants would quit, and surrender up possession of the premises; and that he had full knowledge of plaintiffs' title.

The case was tried by the court, and, upon findings of fact and conclusions of law duly filed, judgment was entered in

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Opinion of the Court—Hays, C. J.

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favor of the plaintiffs, from which defendants appeal to this court.

HAYS, C. J.—This case has been prepared with great care, and presented with marked ability on each side. It is conceded that the contract upon which this action is based was drawn by one of the defendants, who is a lawyer; that there was no other attorney present, or to be procured, at the time and place where it was drawn. Our first duty is to ascertain what the parties themselves meant and understood by the terms of this instrument; for if the intention is plain and clear, we ought, if possible, to give force and effect to their intent.

Reading this contract, then, in the light of surrounding circumstances, as they existed at the time of drawing and executing the same, we think it must be construed to be a lease with an option to purchase. Did not the defendant who drew the contract so understand it? If not, did he not intend that the plaintiffs, who are unlearned in the law should? If he did not intend that the plaintiffs should so understand it, why did he begin the instrument, "This indenture of lease with privilege of purchase"? Again, the words are used, "grant, demise and lease." Then, the usual reservations of a lease are found—that the parties of the first part shall have the right to inspect the mines at all times. "The parties of the second part agree to enter upon said properties and extract ore so long as they shall deem it profitable." They are to do the work in a proper and workman-like manner, to keep the property clear of all liens for working the same, and to pay one-half of the gross proceeds of the mine, as fast as taken out, to the parties of the first part; and "upon the expiration of the term hereby granted," to surrender up the said premises, with all the improvements, unless on or before the twenty-seventh day of November, 1883, the said sum of \$40,000 should have been paid"; and, "upon failure to comply with any covenant, promise, or thing therein contained by the parties of the second part, to re-enter, take possession," etc.

True, the contract provides that the parties of the first part shall credit the said purchase price of \$40,000 with the sum so received, and there are terms used that might be construed



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into a contract of sale. But in construing a contract it is contrary to well-settled rules to give it a narrow and technical interpretation, based upon some particular word or clause. The intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent, if possible.

At the time of making the contract, and as a part of the transaction, the appellants executed and delivered to respondents the agreement in writing drawn by defendant Ganahl, in which they mention the contract as a "lease with the privilege of purchase," and they also describe themselves as "lessees." Under the circumstances, how must the respondents have considered the contract, and what did the appellants intend to have them understand? We think the natural interpretation of the words used indicates the intention of the respondents to lease the premises in dispute to appellants, and to give to them the right or option to purchase, at any time during the life of said lease, upon the payment in full of the amount agreed upon. It seems to us that it must have been so understood by all the parties. While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties themselves, or by the circumstances of the case. (3 Parsons on Contracts, 383; 1 Pomeroy's Equity Jurisprudence, sec. 455; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725; *Utley v. Lumber Co.*, 59 Mich. 263, 26 N. W. 488.)

Waterman, in his work on the Specific Performance of Contracts, says: "Courts of equity formerly paid but little attention to the mere time of which the stipulations of a contract were to be performed, and carried the doctrine of relief, notwithstanding a want of punctuality, to an extravagant length." "But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the common accidents, mistakes, infirmities and inequalities belonging to all human transaction." (Waterman on Specific Performance of Contracts, sec. 456.)

Equity usually treats time as originally of the essence of the contract when the agreement shows that the parties intended that it should be so regarded. (Waterman on Specific Performance of Contracts, secs. 459, 460; Pomeroy's Specific Per-

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formance of Contracts, secs. 399, 401; *Grey v. Tubbs*, 43 Cal. 362; *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484; *Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 274, and note; Willard's Equity Jurisprudence, 294; *Phelps v. Railroad Co.*, 63 Ill. 468.)

This rule seems to be well settled, and perhaps the more difficult question for solution now before us is whether time, in this case, has been made essential. The contract provides that it shall run until the twenty-seventh day of November, 1883. It further provides for a conveyance, provided the sum of \$40,000 shall have been paid on or before the twenty-seventh day of November, 1883. It further provides that upon the expiration of the term hereby granted, to surrender up the possession of said premises, with all the improvements, to the said parties of the first part, unless, on or before the said twenty-seventh day of November, 1883, the said sum of \$40,000 has been paid. Again, by the terms of the extension of November 24th, which are: "In consideration of the extension of the time of the above instrument for thirty days, or until and including December 27, 1883"—it would seem that the parties understood and intended to make time essential; for the respondents extend the time until and including December 27, 1883. Each party is specific in fixing the limit of time. Then, again, we may be aided in reaching a correct conclusion by an examination of the character of the property. Real estate is less stable in this country than in England, hence our courts have been more liberal in extending the rule and allowing the special facts and circumstances of each case to have a more controlling influence. Time is usually regarded as of the essence of the contract, both in England and America, where the character of the property renders it liable to fluctuations in value. (Pomeroy's Specific Performance of Contracts, sec. 385; Waterman on Specific Performance of Contracts, sec. 460; Fry on Specific Performance of Contracts, secs. 713, 718; *Green v. Covillaud*, 10 Cal. 330, 70 Am. Dec. 725; *Jennisons v. Leonard*, 21 Wall. 302; *Goldsmith v. Guild*, 92 Mass. 239; *Christie's Appeal*, 85 Pa. St. 463.)

Fry on Specific Performance of Contracts, section 716, says: "The nature of all mining transactions is such as to render time essential; for no science, foresight or examination can

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afford a sure guaranty against sudden loss, disappointment and reverses; and a person claiming an interest in such an undertaking ought, therefore, to show himself in good time willing to partake of the possible loss as well as profit." The same, in substance, has been stated by many other authors. (Waterman on Specific Performance of Contracts, sec. 460; Pomeroy's Specific Performance of Contracts, sec. 385, and note; Willard's Equity Jurisprudence, sec. 292.) We think this a wise rule, and that it should be adhered to, especially in a mining country like ours.

It is claimed by the appellants that respondent Reeser extended the time after the twenty-seventh of December, 1883. The trial court found that no such extension had been made, and the evidence abundantly sustains this finding.

It is also claimed by the appellants that no demand was made upon them by respondents for the possession of the mine. The trial court found the demand was made, and we think the evidence preponderates in favor of the finding.

The appellants offered payment in full, in June, 1884; but this being made long after the commencement of the action, and more than five months after the time limited by the parties for such payment, we think, cannot be available for the reasons heretofore stated.

It has been urged with great force that in this case appellants have paid to plaintiffs more than one-half of the agreed price; but it must be remembered that this was all from the moiety of ore, or from the proceeds thereof, stipulated to be paid, and must be treated as royalty or rent for the use of the mine. We think, in the case at bar, a different rule should govern than what would be applied in an ordinary sale of real estate. For then, usually, the value of the realty remains the same; and if the grantor is permitted to retain both payment and realty, great injustice might be done. But in the case at bar each ton of ore taken out depletes the mine so much, and in this case it has been exhausted to the amount of over \$42,000. But it is claimed that the appellants have worked the mine at great loss. By the terms of the contract they were at liberty to abandon the work whenever they should deem it unprofitable. Surely

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Opinion of the Court—Buck, J., Dissenting.

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it will not be claimed that equity can be invoked to relieve a party from the result of a bad bargain alone.

Many other questions have been discussed, and many points urged by appellants, and, after a careful consideration of them all, we deem it unnecessary to discuss them at length, as we find no error.

Taking into consideration the contract as we construe it, the evident intent of the parties, the nature and character of the property in dispute, we think the conclusion is irresistible that time is of the essence of the contract, and that a court of equity, with all its great and varied power, cannot decree a specific performance in this case.

Judgment is therefore affirmed.

Broderick, J., concurring.

BUCK, J., Dissenting.—Conceding, for the present, that the contract in question is a lease with the option to purchase, when does the lease go into operation, and when is the option to purchase exercised? It seems to be mutual. It is signed by both parties, and each covenants to do certain acts. As a lease it was partly executed when the defendants entered into possession of the mine. Until the option to purchase was exercised the defendants held as lessees. Whenever they exercised that option by the terms of the instrument they held as vendees. A sale is a contract whereby the ownership to property is transferred. The sale is completed when the possession and title pass from vendor to vendee. In the case at bar the possession was in defendants, but under the lease the title remained in the plaintiffs, the lessors. When the option to purchase was exercised the title passed from the lessors to the lessees, and their relation changed from lessors and lessees to vendors and vendees. The lessees having possession under an agreement to purchase, at a purchase price of \$40,000, the title passed whenever they exercised their option by paying the purchase price, or any part of it. By the terms of the contract all money paid to the plaintiffs was to be credited on the purchase. Whenever, therefore, a credit was so made, a part of the purchase price was paid, and I apprehend the option to purchase was exercised.

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We cannot call this payment royalty or rent, because, to do so, would contradict the express provisions of a sealed instrument. After the purchase this contract, which, up to that time, had operated as a lease, became, in its legal effect, a mortgage to secure the payment of the unpaid purchase price.

It is said that under the terms of this instrument the defendants could abandon the venture at any time. This provision enables us to appreciate the importance of that provision which makes the money paid purchase price. To induce defendants to continue the venture, and not abandon it, the plaintiffs stipulate that every dollar paid shall be a credit in payment of the mine. Can we say after, under this inducement, the defendants have expended a large amount of money, and paid plaintiffs more than half the amount of the purchase price, that the plaintiffs may alter or disregard the express covenant which has been the inducement to defendants' outlay, and say this \$21,000 which you have paid us is only rent—you have not yet paid us any part of the purchase money—you have never exercised your option to purchase? It is claimed that time is of the essence of this contract. The general rule for the purchase of land is that time is not of the essence of the contract. It is claimed, however, that mining property constitutes an exception. Certain text-writers are quoted as sustaining this exception. An inspection of these references, however, gives us but two or three ancient English cases. No American cases are cited. If this exception is established by adjudication, it is remarkable that upon this coast, in the forty years of mining, no such has been adjudicated.

The terms used in the contract specifying the time at which the entire purchase price should be made, and when the plaintiffs might re-enter, cannot be said to determine that time is of its essence; for much stronger language has been adjudicated as meaning differently. Conceding, however, for the argument, that this exception exists in the case of mere options for the purchase of mining property, the question remains, Is this contract simply an option? It is admitted that it is unusual in its terms, conditions and covenants, and that it is difficult to construe. If we attempt to construe it on the theory that it is simply a lease, with an option to purchase, the terms used

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Opinion of the Court—Buck, J., Dissenting.

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will be unnecessary and confusing. If we consider, however, the circumstances of the parties and the property at the time the contract was executed; that, as seems established by undisputed testimony, the plaintiffs wished to sell and the defendants to buy; that nothing whatever was said of leasing the property, and that the word was first used in the contract itself; and interpret this instrument with the light which these circumstances afford—we may understand the contract to be, what it is alleged to be, more than a mere option to purchase; that it was intended to secure the defendants in an anticipated large expenditure of money, and to enable them to secure the fruit of their labor by finally obtaining the title to the property; and also to secure the plaintiffs, through the covenants to re-enter, against the loss of any portion of the purchase price. If, indeed, it is conceded that it is generally understood by miners that time is of the essence in the mere option to purchase mines, that fact may account for the unusual covenants in the contract, and indicate that they were intended to guard against that very construction, and protect the defendants against it.

In addition to these considerations, in considering the relief sought by plaintiffs in enjoining defendants from occupying the disputed premises, we should remember that the plaintiffs covenant in the contract to give defendants a deed, free and clear of all encumbrances, of the premises in dispute. It is admitted that at the time when they claim the \$40,000 should have been paid, and at the time this action was commenced, the property was, and as far as appears is yet, encumbered by a mortgage of at least \$7,000. It is alleged that, after the alleged termination of the lease, demand was made of defendants for the premises. Was a mere demand sufficient? Should not that demand have been accompanied with an offer to fulfill on their part? This action to enjoin defendants and dispossess them of the premises is, in effect, an action for specific performance against defendants. The plaintiffs rely upon the strict letter of the law. They who seek equity must do equity, and I think the rule applies that a party who seeks specific performance must first be prepared to do equity. This the plaintiffs have never done. It is said

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Points decided.

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that the amount of this encumbrance might have been deducted from the contract price; that the plaintiffs intended to pay this encumbrance out of the purchase price. The defendants were not required in the contract to provide for this encumbrance, nor to pay before it was discharged. Over \$21,000 had already been paid, and yet the encumbrance of \$7,000 was unprovided for.

Are the plaintiffs in position to invoke this hard relief against defendants when they have never offered to perform, and have never been in a condition to fulfill, on their part? I think the suggestion that this encumbrance might have been provided against by retaining its amount by defendants is not tenable. This would involve a new contract; plaintiffs claim under the written one set out in the complaint. It is suggested that defendants' tender of the balance due, made six months after the time when the lease terminated, is too late. I think equity will regard the plaintiffs' action as asking for specific performance of the contract, as they allege it to be, and defendants' cross-complaint in response thereto as setting up and praying specific performance, as they understand the contract; that the defendants' tender is made responsive to plaintiffs' demand, and is sufficient in time. I think this view is fully sustained by the authorities cited upon the argument, but I have not the time to classify them. For these reasons I cannot assent to the opinion of the court.

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(March 5, 1886.)

## UNITED STATES v. CAMP.

[10 Pac. 226.]

**INSTRUCTIONS TO JURY.**—The charge to the jury should be brief, explicit and comprehensive—full enough to protect the rights of the parties, and not so prolix as to confuse. It is not error to refuse to give an instruction which has once been given in substantially the same language.

**EVIDENCE.**—Evidence of the pecuniary condition of defendant charged with embezzlement immediately prior to the time and during

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Argument for Appellant.

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the time the offense is alleged to have been committed is competent.

REVIEW OF CRIMINAL CASES.—Upon appeal in criminal cases the review in this court is confined to questions of law. The guilt of defendant is a matter for the jury upon legal evidence.

APPEAL from District Court, Ada County.

Norman H. Camp was convicted of embezzling government money intrusted to him as assayer, and appeals. Affirmed.

Silas W. Moody and George Ainslie, for Appellant.

The burden of proof rested upon plaintiff to show every single circumstance essential to the conclusion that defendant was guilty. (*Sumner v. State*, 5 Blackf. 579, 36 Am. Dec. 561; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; 1 Starkie on Evidence, 571.) And the burden of proof never shifts. (*Commonwealth v. McKie*, 1 Gray, 61, 61 Am. Dec. 410; *Commonwealth v. Eddy*, 7 Gray, 583; *State v. Jones*, 50 N. H. 370, 9 Am. Rep. 242; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, and note; *State v. Crawford*, 11 Kan. 32; *Fife v. Commonwealth*, 29 Pa. St. 429, 439; 1 Greenleaf on Evidence, secs. 34, 35, 78.) Where a legal presumption does not exist, it is error to instruct the jury that one fact should be inferred from another so held as to an instruction that one's failure to pay over public money, if excusable, raised no presumption of felonious appropriation, which would authorize a verdict of guilty. (*People v. Carrillo*, 54 Cal. 63; citing *People v. Walden*, 51 Cal. 588; *Stone v. Geyser Quicksilver Min. Co.*, 52 Cal. 315; 1 Greenleaf on Evidence, sec. 48.) Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given. (*People v. Taylor*, 36 Cal. 255-267; *People v. Williams*, 17 Cal. 142; *Foster v. People*, 50 N. Y. 598.) A defendant indicted for a crime is entitled to have the law applied to every conclusion deducible from the evidence, although the court may think lightly of the weight and value of the testimony; and a charge composed of statutory definitions of the crime, generally applied, will not suffice. (*Scott v. State*, 10 Tex. App. 112; *Lawrence v. State*, 10 Tex.



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App. 495; *Davis v. State*, 10 Tex. App. 31; *People v. Doggett*, 62 Cal. 27; *State v. Dunlop*, 65 Cal. 288; *Schools v. Risley*, 10 Wall. 91.) It matters not how clearly the circumstances point to guilt, still, if they are reasonably explainable on a theory which excludes guilt, they cannot satisfy the jury beyond a reasonable doubt that the defendant is guilty; hence they will be insufficient. (1 Bishop's Criminal Procedure, 3d ed., p. 657, sec. 1077; *Schusler v. State*, 29 Ind. 394; *James v. State*, 45 Miss. 572; *Commonwealth v. Dana*, 2 Met. 329, 340; *People v. Dick*, 32 Cal. 213; *State v. Orr*, 64 Mo. 339; *State v. Maxwell*, 42 Iowa, 208; *Black v. State*, 1 Tex. App. 368; *State v. Johnson*, 19 Iowa, 230; *State v. Collins*, 20 Iowa, 85.)

Fremont Wood, Assistant United States Attorney.

Edgar Wilson, of Counsel for the United States.

No brief on file.

BUCK, J.—The defendant was indicted, tried, and convicted at the December term, 1885, of the district court in and for Ada county, second judicial district, for the crime of embezzlement of \$12,306.36 government money, intrusted to him as assayer at the Boise City assay office, Idaho territory. The evidence establishes the following facts, which are admitted: That defendant took charge of said office on or about June 1, 1883, and was last in charge of the same April 14, 1885. On April 14, 1885, there should have been a balance of \$24,119.78 in his possession of government money received by him during said time. On the last-named date defendant went east, and remained absent until about May, 1885. That during his absence the office and funds thereof were in charge of R. Heurschkel, assistant assayer under the defendant. When the defendant left for the east, and turned the funds over to said Heurschkel, neither counted the money in the presence of the other. Defendant testifies that he counted it himself, and there was in the neighborhood of \$24,000. Heurschkel testifies that he did not count it; supposed it was all right, and reported the full amount on hand for sixteen days thereafter, and until he received orders from Washington to count the same; that upon

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Opinion of the Court—Buck, J.

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the receipt of said order he counted the money with witnesses, and found the funds short in the amount charged in the indictment. It was the theory of the defense that Mr. Heurschkel having equal opportunity to embezzle the funds with the defendant, it was impossible to say that defendant took it, and he should have been acquitted.

Upon this point the defendant asked the court to charge as follows: "The jury are instructed that if they believe from the evidence that the circumstances and testimony point as strongly to some other person or persons as being guilty of taking the funds charged as being embezzled in the indictment number one as they do to the defendant, then the jury are instructed that they must find the defendant not guilty." The law relied on as the foundation for this charge is quoted from 1 Bishop's Criminal Procedure, section 1105, to wit: "If one of two persons is shown to be guilty, but it cannot be distinctly ascertained which one, none can be convicted." It is clear that if it cannot be distinctly ascertained who committed the crime, no one should be convicted. The effect, however, of the charge requested would be to acquit, if the evidence showed two or more were equally guilty. Two might commit a murder, and the evidence show the guilt of both, and yet, because it pointed as strongly to one as to the other, neither could be separately convicted under the charge as requested. To support this charge appellant refers to *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49, and note. The charge there asked for was: "If it is uncertain from the evidence which one out of two or more persons inflicted a stab, the prisoner must be acquitted, unless there is proof that the prisoner aided or abetted the person ascertained to have killed him." The two charges are quite different. Had the charge requested stated that when the evidence pointed as strongly to one as to the other, and it was uncertain which of the two was guilty, the element of uncertainty would have made it impossible to say that either was guilty, there could be no moral certainty by the jury. We think the charge was properly refused. In appellant's brief many principles of law are enunciated which seem sound, and supported by the authorities cited, but we are unable to see that any error therein was committed by the court.

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Opinion of the Court—Buck, J.

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It is insisted that the court should never refuse an instruction asked by defendant in a criminal case to which there is no valid objection. This proposition involves the question as to the character of a charge to a jury. We apprehend that it should be brief, explicit and comprehensive; full enough to protect the rights of the parties, and not so prolix as to confuse the jury. A few plain propositions embracing the law as applicable to the facts are all that are required or should be given. (Kelley's Criminal Law, sec. 367; *State v. Mix*, 15 Mo. 153; *State v. Floyd*, 15 Mo. 349; *People v. Var-num*, 53 Cal. 630; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Davis*, 47 Cal. 93; *People v. Dodge*, 30 Cal. 448; *Railroad Co. v. Horst*, 93 U. S. 295.) We think the charge fairly states the law of the case, and that no essential feature of the defense was omitted. The appellant assigns as error the admission of certain papers, receipts, and documents of defendant, showing his financial circumstances, and his expenditures at the time he assumed such position as assayer, and immediately prior to and during the time of his holding said position. We think such evidence competent and relevant in a charge on embezzlement. (2 Bishop's Criminal Procedure, sec. 327; *Railroad Corp. v. Dana*, 1 Gray, 83.)

In the printed brief the appellant states that said papers were offered and received in bulk, and alleges the same as error. An inspection of the record shows that the objection to their admission was upon the ground of incompetency, and not to the manner of placing them in evidence. We think this objection should have been made at the trial, and cannot be considered for the first time on appeal.

It is urged that the verdict is contrary to evidence. Under our Criminal Practice Act this court cannot consider the weight of conflicting evidence. We may review errors of law in admitting evidence, and, in case of error, grant a new trial, but the question of fact, where there is any legal evidence, is for the jury. (*People v. Ah Hop*, 1 Idaho, 698.)

We find no error, and the judgment is affirmed.

Hays, C. J., and Broderick, J., concurring.

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Opinion of the Court—Broderick, J.

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(March 5, 1886.)

WYATT v. WYATT.

[10 Pac. 228.]

**DIVORCE—ALIMONY.**—The allowance of alimony to the wife and counsel fees pending an action of divorce rests in the sound discretion of the trial court.

**ALIMONY—ORDER NOT APPEALABLE.**—Under the laws of this territory no appeal lies to the supreme court from an order in an action of divorce, for the payment of alimony *pendente lite*, and counsel fees. The parties must abide by the discretion of the court in this regard until a final judgment is rendered in the action.

**RESTRAINING ORDER DURING SUIT FOR DIVORCE.**—In an action for divorce a restraining order to save the property pending the litigation may be reviewed on an appeal to this court.

APPEAL from District Court, Ada County.

Brumback & Lamb, for Appellant.

Pending proceedings for divorce, a proper case of emergency being shown, may be enjoined from interfering with the custody of the children or of property in the possession of the wife.

(*Rose v. Rose*, 11 Paige Ch. 166; *Vanzant v. Vanzant*, 23 Ill. 536; *Errissman v. Errissman*, 25 Ill. 136.) Temporary alimony must be limited to the actual wants of the wife. (*Germond v. Germond*, 4 Paige, 643.) Where the wife has a separate income, alimony for support denied. (*Collins v. Collins*, 2 Paige, 9; *Denton v. Denton*, 1 Johns. Ch. 364.)

Huston & Gray, for Respondent.

“The order for alimony merely enforces the husband’s duty to support his wife.” (Stewart on Marriage and Divorce, secs. 365, 366, 368; 2 Bishop on Marriage and Divorce, secs. 374, 384, 385, 387, 391, 393, 396, 406, 419, 420.) The power to decree alimony falls within the general powers of a court of equity. (*Galland v. Galland*, 38 Cal. 265; *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Ex parte Perkins*, 18 Cal. 60; Stewart on Marriage and Divorce, secs. 388, 389.)

BRODERICK, J.—This is an appeal from an order of the district judge, at chambers, awarding to the plaintiff alimony

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Opinion of the Court—Broderick, J.

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for support pending her divorce suit, and for counsel fees. The first question presented is whether this court has jurisdiction in this class of cases. It is conceded that the court here possesses no power in divorce suits except such as is conferred by statute. Congress has provided that writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court of the territory, under such regulations as may be prescribed by law. The legislature has provided, by section 642 of the code, that an appeal may be taken from the district courts to the supreme court from a final judgment, and then the mode of appeal is prescribed. Can it be said that an order for alimony *pendente lite* is a final judgment within the meaning of the statute?

It is contended by counsel for the appellant that the order is in the nature of a final judgment, and appealable as such, and, in support of this argument, cite *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, and 8 Pac. 709. From a careful examination of the Sharon case, it appears that the decision was placed upon the following grounds: 1. That an action of divorce is in the nature of a case in equity; 2. That by the constitution of California the supreme court had appellate jurisdiction "in all cases in equity." The court say: "Appellate jurisdiction in other enumerated cases was and is conferred, but the jurisdiction of this court in an action of divorce, in our opinion, depends on its being, in this state at least, a case in equity." The decision in this case being based on the terms of the constitution conferring upon the supreme court appellate jurisdiction in all cases in equity, it was further held that "wherever and whenever a superior court has jurisdiction to take any step or proceeding, or make any order in any case in equity, of that step, proceeding, or order the supreme court has appellate jurisdiction."

There is no provision, either in the organic act or statute of this territory, that corresponds to the constitutional provision of California; hence it does not seem to us that the Sharon case is applicable to the case at bar. Our statute defining the appellate jurisdiction of this court (Code, sec. 21), reads: "Its appellate jurisdiction extends to a review of all

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Opinion of the Court—Broderick, J.

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cases removed to it, under such regulations as are or may be prescribed by law, from the final decisions of the district courts." It is said by Judge Bovier that a "final judgment is one which puts an end to a suit." Certain it is that the order appealed from does not come within this definition. It is an incident to the suit. But it is said in some of the cases that such an order is in the nature of a final judgment. This is the most that has or can be said. That such an order may be said to be in the nature of a final judgment does not convince us that the legislature intended to make it appealable. And as this class of orders is not enumerated among the interlocutory judgments and orders made appealable by other provisions of the statute, it cannot be claimed that an appeal will lie in this case unless the order is appealable as a final judgment. Whether there should be an appeal in such cases is not for us to determine; but it seems to us that an appeal would, in many instances, defeat the object and purpose of the statute allowing temporary alimony.

Where a wife has good ground for divorce, but has no property in her own right, it is doubtful if she can bind herself personally to pay her counsel. Certainly she cannot bind her husband nor the community property. Since she can neither bind her husband nor the community property, unless she had means of her own, she would be powerless to assert and maintain her right to a divorce if the court could not interfere. From the very necessity of the case, therefore, the court should, on application, award her a reasonable allowance for her support, and a sufficient sum with which to employ counsel. The amount awarded should only go to the necessities of the case, considering all the circumstances and the ability of the husband to pay. In view of the necessity which so often arises, and the obligation of the husband to support the wife, the legislature has, in our judgment, seen proper to leave the matter of temporary alimony to the sound discretion of the trial courts, and by that discretion the parties must abide, in such cases, until a final judgment is rendered. If this has not been wisely done, the law-making power must supply the defect or omission. (1 Bishop on Marriage and Divorce, sec. 71; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Chase v. Ingalls*, 97 Mass.

## Points decided.

524; *Ex parte Perkins*, 18 Cal. 60; 2 Bishop on Marriage and Divorce, sec. 352; *Cook v. Cook*, 56 Wis. 203, 43 Am. Rep. 706, 14 N. W. 33, 443; *Bacon v. Bacon*, 43 Wis. 197.)

Our conclusions are that the supreme court has no jurisdiction in this case, except in so far as the order restrained the defendant from disposing of his property. From the restraining order an appeal is allowed. After an examination of the complaint, and the affidavits of the plaintiff and defendant used on the hearing when the order appealed from was made, we are satisfied that there was sufficient ground for granting the restraining order to preserve the property until the rights of the parties could be settled and determined by a decree.

Appeal dismissed, except as to the restraining order, and therein affirmed.

Hays, C. J., and Buck, J., concurring.

(March 8, 1886.)

**BRADBURY ET AL. v. IDAHO AND OREGON LAND IMPROVEMENT COMPANY.**

[10 Pac. 620.]

**PRACTICE—SPECIAL FINDINGS—VERDICT.**—Where there is an inconsistency between the special findings and the general verdict of a jury, the special findings control the judgment.

**MECHANIC'S LIEN LAW—STRICTLY CONSTRUED.**—The mechanic's lien law must be strictly construed, and cannot extend beyond the express provisions of the statute.

**EXCEPTIONS TO RULINGS OF COURT—WHEN TO BE CONSIDERED ON APPEAL.**—Exceptions to the ruling of the court upon the admission and rejection of the evidence may, when properly incorporated into a statement of the case, having been used upon the hearing of a motion for a new trial, be considered on an appeal from a judgment in the same manner as when brought up by a bill of exceptions.

**IRRELEVANT EVIDENCE—NOT GROUND FOR REVERSAL—WHEN.**—Irrelevant evidence is not sufficient ground for the reversal of a judgment when it does not prejudice the cause of the party excepting to it.

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Argument for Respondent.

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APPEAL from District Court, Alturas County.

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F. E. Ensign, for Appellant.

As to when a general verdict will be set aside on the ground of inconsistency between special verdict and the general verdict. (*Baylis v. Travelers' Ins. Co.*, 113 U. S. 316, 5 Sup. Ct. Rep. 494.) When held that an action to embrace a mechanic's lien is an action at law. (Phillips on Mechanics' Liens, 5; *Coleman v. Freeman*, 3 Ga. 137; *Quimby v. Sloan*, 2 E. D. Smith, 615; *Ottey v. Hariland*, 36 Miss. 19; *Miller v. Wallingsworth*, 33 Iowa, 224.)

Huston & Gray, for Respondent.

There having been no exceptions taken to the verdicts, findings of fact or conclusions of law, the assigned errors thereto will not be considered by this court. (*Cogland v. Beard*, 67 Cal. 303, 7 Pac. 738; *Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641; *People v. Hunt*, 1 Idaho, 433; *Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, ante, p. 95, 6 Pac. 107; *Young v. Martin*, 8 Wall. 354; *Bacon v. Robson*, 53 Cal. 399; Thatcher's Practice, p. 303, secs. 75, 81.) In equity cases the verdict is merely advisory; the judge may qualify, alter or set aside the verdict and find the facts. (*Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540; *Bates v. Gage*, 49 Cal. 126.) When a jury renders a general verdict and a special verdict, the latter will control the former if there is any inconsistency between them. (*Lees v. Clark*, 20 Cal. 387.) A corporation that has received and retained the consideration of a contract for its benefit, cannot deny its liability thereon on the ground the contract was *ultra vires*. (*Main v. Casserly*, 67 Cal. 127, 7 Pac. 426; Sedgwick on Statutory and Constitutional Law, 73; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Dec. 656; *Pixley v. Western Pac. R. Co.*, 33 Cal. 198, 91 Am. Dec. 623; *Foulke v. San Diego R. R. Co.*, 55 Cal. 365.) A party who complains of the rejection of evidence must make it appear by his bill of exceptions or statement that if the evidence had been admitted it might have led the court or jury to a different result. (Thatcher's Practice, p. 302, sec. 72; *Packet Co. v. Clough*, 20 Wall. 528; *Roberts v. Unger*, 30 Cal. 676.) Where the charge of the court,



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taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which properly could have been given, or that some of those given are subject to verbal criticism. (*Evanston v. Gunn*, 99 U. S. 660; *Thatcher's Practice*, p. 153, sec. 19; *Brooks v. Crosby*, 22 Cal. 42; *Conroy v. Duane*, 45 Cal. 597; *Simers v. Eisen*, 54 Cal. 418; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63.)

BUCK, J.—This action was brought to collect an acceptance for \$6,774.49, payable in fifteen days from date, which had been protested, and was unpaid. The plaintiffs claim that said acceptance was given for a balance found due on settlement from defendant to plaintiffs for digging an irrigating ditch in Alturas county, Idaho territory; and pray the foreclosure of a mechanic's lien upon said ditch. The complaint also alleges that said ditch was dug upon contract, and sets out the contract therein. The answer admits the contract and the settlement, but alleges that, without defendant's knowledge or authority, the plaintiffs dug said ditch larger than the contract specified, and that the alleged settlement was made by them without knowing of said enlargement, and was procured by plaintiffs by fraud, and deny that a larger sum than \$500 was due thereon.

The case was tried by a jury, and the following special questions were submitted to the jury, and answered, to wit: "1. Was the ditch constructed upon the survey made by the engineer in charge employed by the defendant corporation? A. Yes. 2. Did the dimensions of the ditch as laid out by the engineer in charge vary from the dimensions as stated in the written contract? A. Yes. 3. Were the changes and variations in the dimensions of the ditch made with the knowledge of Mr. Case, the vice-president and general manager of the defendant corporation, and by his direction? A. Yes. 4. Was there a settlement between the plaintiffs and defendant on the ninth day of June, 1883? A. Yes. 5. What amount was found to be due to plaintiffs from defendant upon such settlement? A. \$16,774.49. 6. Did the defendant, by its general manager, R. E. Strahorn, give its acceptance to plain-

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tiffs for the sum of \$6,774.49 upon such settlement. A. Yes." The jury found a general verdict that there was due plaintiffs, \$4,274.49, and twenty per cent interest from date of acceptance.

The court found several findings of fact, and the following conclusions of law: "Conclusions of Law: 1. That the plaintiffs are entitled to a judgment for \$10,107.52; 2. That plaintiffs are entitled to a decree of foreclosure of the lien set forth in their complaint; and it is so ordered."

The appeal is taken from the order overruling a motion for a new trial, and from the judgment, and is brought upon a statement of the case.

The record assigns as error: "1. That the first four findings of fact by the court are not sustained by any findings or special verdict of the jury; 2. That the court erred in making any finding of facts after the cause had been once submitted to a jury; 3. That the court erred in its first conclusion of law, in that it is in conflict with the general verdict of the jury, and because there is no finding of fact by the jury authorizing it; 4. That the conclusion of law that the plaintiffs were entitled to a foreclosure of the mechanic's lien is not supported by the evidence, in that the evidence does not show that it was filed of record within thirty days after the work was done, and that the notice itself shows that it was only intended as a lien upon a ditch as originally contracted for; 5. That the court erred in decreeing a foreclosure of the lien for the full amount, because the damages allowed for protest are not secured by the lien."

There are also other alleged errors which will be considered hereafter. The alleged error of rendering judgment for a different amount than specified in the general verdict seems not well taken. Section 385 of our code provides that where special findings of fact are inconsistent with the general verdict, the former control the latter, and the court must give verdict accordingly. There is an inconsistency between the special findings of fact and the general verdict, but the judgment is in accordance with the special findings, and is valid under said section of the code.

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The alleged error that the conclusion by the court that the plaintiff was entitled to the foreclosure of his mechanic's lien was error seems not well taken, as the evidence shows the plaintiffs to have been original contractors, and entitled to sixty days in which to file their lien.

The objection to the decree of foreclosure on the ground that the lien, if allowed, could not cover damages for protesting the acceptance, seems well taken. The lien exists only by force of the statute, and cannot exceed the express provisions thereof. Section 815 of our code provides that the lien is for work, labor, or material done and furnished, and section 827 allows the lien to extend to moneys paid for filing and recording the same. It cannot be extended beyond these items. (1 Jones on Mortgages, sec. 360; Phillips on Mechanics' Liens, sec. 204.)

In the statement of the case are several exceptions to the ruling of the court in the admission or rejection of evidence. It is maintained by respondents that such exceptions can only be brought up on a bill of exceptions. Section 413, subdivision 3 of the code, provides that if a motion for a new trial is to be made upon a statement of the case, the moving party must prepare the statement. When the notice of motion designates errors in law occurring at the trial as the ground relied on in the motion the particular errors relied on shall be specified therein. The code seems to make no distinction between the errors to be brought up in a bill of exceptions and on a statement. It seems to leave it optional with the aggrieved party as to which method he will adopt. A statement of the case can only be made upon a motion for a new trial. Upon a simple appeal from the judgment no statement is authorized. A statement once made may be used on appeal from a judgment, under section 653 of the code, and, under the authorities, it seems that a statement can be so used on an appeal from a judgment only when first used on a motion for a new trial. (Hayne on New Trial and Appeal, sec. 254.) In other respects a statement and bill of exceptions are similar. (*People v. Crane*, 60 Cal. 279; *People v. Lee*, 14 Cal. 510; *Purdy v. Steel*, 1 Idaho, 216; *People v. Hunt*, 1 Idaho, 436.) We are of the opinion that exceptions

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to the ruling of the court in admitting or rejecting evidence may be considered on a statement, where a statement is authorized, the same as in a bill of exceptions.

Examining these alleged errors, we find that the rulings of the court sustaining objections to certain questions specified in the fifth assignment of error are in harmony with established rules of evidence. The first question is, "What conversation, if any, was had at the time of making the contract?" The written instrument itself contains the final result of their conversation, and what they said outside of it was immaterial. "2. Did you inform plaintiff Bradbury that you had no authority to contract for a larger ditch than that specified, and that a different contract would not be ratified?" The issues made by the pleadings were, Was the ditch dug and accepted? The preliminary conversations of parties would be irrelevant to these issues, and were properly rejected. The evidence admitted under objections in assignments of error Nos. 1, 2, 3, and 4 went, generally, to the progress of the enterprise, and, while apparently not relevant to the chief issue of the acceptance of the ditch as completed by the defendant we cannot see that it in any way prejudiced defendant's case.

We think the instructions present the issues in the case fairly to the jury, and that no matter material to the appellant's cause was omitted.

Judgment affirmed as to judgment, and decree for foreclosure of lien modified by striking from the amount the penalty for protest.

Hays, C. J., and Broderick, J., concurring.

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Argument for Appellant.

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(March 8, 1886.)

## McCARTY v. BOISE CITY CANAL COMPANY.

[10 Pac. 623.]

**IRRIGATION—OVERFLOW OF WATER FROM DITCH—INJURY TO ADJOINING LAND—LIABILITY.**—A person owning a ditch from which water escapes upon the premises of the adjoining owner, allowing such water to continue to escape from his ditch after notice, without any effort to prevent the same, cannot escape the liability for damages done thereby on the ground that the adjoining land owner might, at a slight expense, have prevented any damage by digging a ditch on his land that would have conducted said water off his premises.

**NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**—A person guilty of negligence cannot avoid responsibility therefor on the ground that others are also guilty of negligence contributing to the same injury.

APPEAL from District Court, Ada County.

Brumback &amp; Lamb, for Appellant.

It is not only the moral, but the legal, duty of a party who seeks redress for another's wrongs to use due diligence in preventing loss thereby. (Sedgwick on Damages, 7th ed., pp. 164, 173, and notes; *Pacific R. R. Co. v. Muhlman*, 17 Kan. 224; 1 Sutherland on Damages, pp. 148-155; *The Baltimore*, 8 Wall. 377; *Chase v. New York R. R. Co.*, 24 Barb. 273.) If by want of ordinary care a plaintiff may have avoided the consequences of defendant's negligence, he is considered to be the cause of his own injury. (Weeks' *Damnum Absque Injuria*, 240; *Hance v. Cayuga etc. Ry. Co.*, 26 N. Y. 428.) It is the duty of a person to use ordinary and reasonable care and means to prevent an injury and its consequences, and he can only recover damages for such losses as could not by such care and means be avoided. (Weeks' *Damnum Absque Injuria*, 245; *Douglas v. Stevens*, 18 Mo. 362; *Illinois Co. v. Finnegan*, 21 Ill. 646; *Broom's Legal Maxims*, 279; *Loker v. Damon*, 17 Pick. 284; *Thompson v. Shattuck*, 2 Met. 617; *Hamilton v. McPherson*, 28 N. Y. 76, 84 Am. Dec. 330; *Hassa v. Jinger*, 15 Wis. 598;

## Argument for Respondent.

*Darwin v. Potter*, 5 Denio, 307.) The rule as to the degree of diligence and care required of defendant is well established. The defendant was bound to the use of such care in the management of its ditch, as prudent persons employ in the conduct of their own affairs. (*Hoffman v. Water Co.*, 10 Cal. 413; *Wolf v. Water Co.*, 10 Cal. 544; *Richardson v. Kier*, 34 Cal. 63, 91 Am. Dec. 681; *Campbell v. Water Co.*, 35 Cal. 682; *Chidster v. Ditch Co.*, 59 Cal. 204; *Todd v. Cochell*, 17 Cal. 98; *Panton v. Holland*, 17 Johns. 99, 100, 8 Am. Dec. 369.)

## Huston &amp; Gray, for Respondent.

A general specification of error, that the evidence is insufficient to justify the verdict, is not sufficient. (*Mahony v. Van Winkle*, 21 Cal. 552; *Reamer v. Nesmith*, 34 Cal. 624; *Cross v. Zane*, 45 Cal. 89; *Preston v. Hurst*, 54 Cal. 596; *Phillips v. Lowry*, 54 Cal. 584; Code Civ. Proc., sec. 413.) The evidence was conflicting; the question as to the negligence of defendant was a question of fact and was properly submitted to the jury. (*Siegel v. Eison*, 41 Cal. 109; *Fernandas v. Sacramento City R. R. Co.*, 52 Cal. 45; *Jameson v. S. J. etc. R. Co.*, 55 Cal. 593; *McNamara v. N. P. R. Co.*, 50 Cal. 581; *Reynolds v. Scott* (Cal.), 4 Pac. 346; *Nehabas v. C. P. R. R. Co.*, 62 Cal. 329; *Denver etc. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142.) When the evidence is conflicting, neither the verdict of the jury nor the findings of the court will be disturbed. (1 Rhodes' California Digest, p. 67, sec. 755; *Marble v. Foy*, 49 Cal. 585; *Doe v. Vallejo*, 29 Cal. 385; *Brewster v. Sime*, 42 Cal. 139; *Fitzgerald v. Union Ins. Co.*, 54 Cal. 599; *Wakefield v. Bouton*, 55 Cal. 109; *Hughes v. Sweeney*, 67 Idaho, 93, 24 N. W. 607.) The failure of plaintiff to dig a ditch or drain to carry off the water that was allowed to flow upon her land from the ditch of defendant through the negligence of defendant is in no sense contributory negligence. (*Philadelphia etc. R. R. Co. v. Hendrickson*, 80 Pa. St. 182, 21 Am. Rep. 97; *Philadelphia etc. R. Co. v. Shultz*, 93 Pa. St. 341; *Kellogg v. Chicago etc. W. R. R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Salmon v. Delaware etc. R. Co.*, 38 N. J. L. 5, 20 Am. Rep. 356; *Delaware etc. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *Fitch v. Pacific R. R. Co.*, 45

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Mo. 322; *Richmond etc. R. R. Co. v. Medley*, 75 Va. 499, 40 Am. Rep. 734; *Louisville etc. Ry. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 97, and note; *Flynn v. San Francisco etc. R. R. Co.*, 40 Cal. 14, 6 Am. Rep. 595, and note; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124, 38 Am. Dec. 75; *Nehrbas v. C. P. R. R. Co.*, 62 Cal. 329; *Snyder v. P. C. etc. Ry. Co.*, 11 W. Va. 37.) Negligence of third parties concurring with that of defendant to produce the injury no defense. (Cooley on Torts, 684; 4 Wait's Actions and Defenses, 719.) If the charge given by the court covers the entire case, and submits it properly to the jury, the court may refuse to give further instructions. (*Ind. etc. R. R. Co. v. Horst*, 93 U. S. 291; *Rogers v. Marshall*, 1 Wall. 649; *Harvey v. Tyler*, 2 Wall. 338; *Tabor v. Cooper*, 7 Wall. 565; *Denver etc. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142; *Cunningham v. U. P. R. Co.*, 4 Utah, 206, 7 Pac. 795.) The court found that the injury was the result of defendant's carelessness and neglect. The granting of a perpetual injunction by the court was proper. The effect of the water from defendant's ditch, through the neglect of defendant allowed to flow upon her land, was a nuisance. (Idaho Ter. Rev. Laws, p. 145.) The plaintiff having established her right at law by obtaining a judgment, was entitled to the remedy. (High on Injunctions, secs. 739-753; High on Injunctions, secs. 879, 1,309; High on Injunctions, sec. 356; *Evans v. Ross* (Cal.), 8 Pac. 88; *Ramsey v. Chandler*, 3 Cal. 90.) The evidence showed the injury was continuing and irreparable. (*Tuolumne W. Co. v. Chapman*, 8 Cal. 392.) To prevent multiplicity of suits. (*Scofield v. Lake Shore etc. Ry.*, 43 Ohio St. 571, 54 Am. Rep. 846, and note, 3 N. E. 907.)

BUCK, J.—The defendant is a corporation existing under the laws of Idaho territory, organized for the purpose of digging and operating a ditch for irrigation. The ditch is constructed across the farm of plaintiff. The complaint filed June 17, 1884, alleges, in substance, that during the years 1883 and 1884 the plaintiff's land had been damaged by water escaping from the ditch and running upon it during said years, and prior thereto, through defects in the same, and by carelessness and mismanagement in operating the same, in the

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sum of \$400. The defendant, answering, alleges, among other things, that said damage, if any, was the result of the carelessly and negligently flowing water thereon by plaintiff, and from rains and floods, and denies all the allegations of the complaint. The cause was tried by a jury, who found a verdict for plaintiff, and assessed her damages in the sum of \$150. The appeal is taken from the judgment, and from the order overruling a motion for a new trial. A bill of exceptions is incorporated in the record.

The first assignment of error is that the verdict is unsupported by the evidence in that the evidence is not sufficient to prove that water in sufficient quantity to injure the land of plaintiff ever escaped through or over defendant's ditch upon the same. The second error assigned is that the evidence shows that whatever damage was done to plaintiff's land was done by irrigating land above plaintiff's land, by others than defendant, and by the plaintiff's careless irrigating of her own land surrounding the portion alleged to have been injured. Evidence upon both of these propositions was submitted to the jury, and it was their especial province to determine its weight and credibility. Except in the absence of all evidence, we cannot disturb their findings thereon.

The third alleged error is the refusal of the court to allow the defendant to show that, at a small expense on the part of plaintiff, any surplus water that may have come from defendant's ditch could have been conducted off of the land of plaintiff, so that the same would do her no harm. This proposition involves the main issue of the appeal. The important question is, What are the relative duties and obligations of the ditch owners and the owners of the land through which the ditch runs?

It is admitted that the alleged overflow and seepage had continued with the knowledge of defendant for at least a year; that the plaintiff had notified the defendant of the alleged defects in its ditch, and offered to repair the same so that no water should escape therefrom upon her premises for twenty-five dollars, and that the defendant had declined said proposition. The theory and claim of defendant is that the plaintiff was under a legal obligation to dig a ditch upon her own



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premises, if it could be done at a small expense, and thus conduct the said seepage from defendant's ditch off from her land. If this be true, then it results that ditch owners have such a dominion over the lands through which their ditch is located as gives them not only a right of way for lateral ditches to conduct off water escaping from their main ditch through the adjoining land, but also that such escape ditches shall be maintained by such adjoining owners, providing that it can be done at a small expense. We do not understand that the doctrine relied on can be extended so far. The plaintiff is entitled to control her own premises. (*Flynn v. Railroad Co.*, 40 Cal. 14, 6 Am. Rep. 595; *Yik Hon v. Water Works*, 65 Cal. 619, 4 Pac. 666; *Burroughs v. Railroad Co.*, 15 Conn. 124, 38 Am. Dec. 75; *Railroad Co. v. Hendrickson*, 80 Pa. St. 182, 21 Am. Rep. 97; *Fero v. Railroad Co.*, 22 N. Y. 209, 78 Am. Dec. 178, and note; *Cook v. Transportation Co.*, 1 Denio, 91; *Kellogg v. Railway Co.*, 26 Wis. 223, 7 Am. Rep. 69.)

We understand the rule to be that where one person suffers injury by the carelessness of another, occurring unexpectedly, and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damage, if a temporary expedient or slight expense will do so; but if the one whose carelessness or negligence causes a continuing injury to another, having knowledge of the evil and the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it, and permits it to continue without an attempt to prevent it, he cannot avoid his responsibility by showing that the one injured might have avoided the damage by a slight expense. (Shearman and Redfield on Negligence, secs. 25, 28, 31, 36; *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; Beach on Contributory Negligence, secs. 13, 18, 64; *Railroad Co. v. Anderson*, 31 Gratt. 812, 31 Am. Rep. 750; *Railroad Co. v. Jones*, 95 U. S. 439; *Gould v. McKenna*, 86 Pa. St. 297, 27 Am. Rep. 705; Wharton on Negligence, 74-78; *Fraler v. Water Co.*, 12 Cal. 556, 73 Am. Dec. 562; Cooley on Torts, 679; 4 Wait's Actions and Defenses, 718; *Snyder v. Railway Co.*, 11 W. Va. 37; *Railroad Co. v. Medley*, 75 Va. 499, 40 Am. Rep. 734.)

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Opinion of the Court—Buck, J.

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The appellant assigns the giving of the first six instructions on behalf of plaintiff, and the refusal to give the first, second, and third instructions asked for by defendant, as error. The objection to these instructions given, and to the refusal to give the first and second asked by defendant, are based upon the theory that the plaintiff was guilty of negligence. We think that the evidence offered by defendant itself, and the admissions of defendant, show that plaintiff did all that could legally be required of her, and there was no evidence of negligence to justify the instructions refused, or the rejection of those given. Had plaintiff failed to notify defendant of the defects in its ditch, and thus allowed the damage to continue and increase to her knowledge, when the defendant was ignorant of its cause, or had there been a sudden break in the ditch, which, by a temporary expedient, at a slight expense the plaintiff might have repaired, and thus have prevented the damage, the doctrine of negligence would apply. But in this case we think there was no error in giving or refusing said instructions.

The third instruction asked for by defendant, and refused, is as follows: "The defendant is not liable for damages that may have resulted from rains or floods, or from damages that may have resulted from the acts of other parties in irrigating higher grounds, or from water standing above the ditch of defendant, and percolating through the soil, and accumulating on land of plaintiff; nor from breaks in the banks of the ditch of defendant, if defendant used such care in constructing, operating, and repairing its ditch as a prudent man would use if his own property were exposed to damage." The first proposition in this instruction, though good in a case where there was no question as to water from defendant's ditch contributing toward the damage, is hardly applicable to this case. There seems to be no question that water escaped from the defendant's ditch, and, at best, mingled with the waters from other sources, if such there were. But the fact that others were also liable would not excuse the wrongful negligence of defendant. (Cooley on Torts, 684; 4 Wait's Actions and Defenses, 719.) We think the second part of the instruction not applicable, for the reason that defendant's own testimony shows that it allowed the water to run without using adequate means to stop it, upon

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Argument for Appellant.

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the theory that the plaintiff might avert the damage at a slight expense, and that it was her duty to do so.

The appellants allege as error the refusal of the court to strike out certain findings of fact and conclusions of law. The first finding objected to seems to be necessarily included in the general verdict of the jury, and can result in no harm to defendant, and the others were within the province of the trial judge, and bear upon the matter of the injunction. As to the remaining alleged error, to wit, the granting of the injunction, we are of the opinion that this remedy is not necessary to protect the rights of the plaintiff, and is of doubtful utility.

The judgment is affirmed as to damages, and reversed as to granting the injunction.

Hays, C. J., and Broderick, J., concurring.

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(March 8, 1886.)

## PECOTTE v. OLIVER.

[10 Pac. 302.]

**PROPERTY HELD UNDER WRIT OF ATTACHMENT—EXECUTION ON JUDGMENT—TO WHOM SHOULD ISSUE.**—The officer who seized goods under a writ of attachment, and holds the same, is the proper officer to whom the execution on the judgment in the attachment suit should issue.

**SAME—ISSUED TO WRONG OFFICER—EXECUTION AMENDABLE.**—Where a constable attached and held goods, and the execution was directed to the sheriff, but delivered to the constable, who served the same, *held*, the execution not void but amendable.

**SUIT AGAINST CONSTABLE—EXECUTION PROPER EVIDENCE.**—Where constable was sued for value of goods seized, *held*, execution proper evidence in his defense, and error in court to exclude the same.

**APPEAL** from District Court, Alturas County.

F. E. Ensign, for Appellant.

When a writ is directed to an improper officer, but executed by a proper officer, the error in the direction does not vitiate the writ, and may be cured by amendment. (*Walden v. David-*

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son, 15 Wend. 578; *Hearsey v. Bradbury*, 9 Mass. 95; *Rollins v. Rich*, 27 Me. 557; *Campbell v. Stiles*, 9 Mass. 217; *Bronson v. Earl*, 17 Johns. 63.) A writ of execution directed to the sheriff, but handed to a constable and executed by him, is valid. (*Blanchard v. Waters*, 10 Met. (Mass.) 185; *Lyon v. Fish*, 20 Ohio, 104.)

Kingsbury & McGowan, for Respondent.

Defendant offered in evidence an execution from the probate court of Alturas county, directed to the sheriff of Alturas county. On plaintiff's objection the execution was excluded. Defendant also objects to some of the charges. Plaintiff recovered judgment. Defendant appeals. 1. There was no error in overruling the demurrer. In the states, the United States bankrupt laws suspend state insolvency laws. (*Sturges v. Crownshield*, 4 Wheat. 122; *Burrill on Assignment*, 547.) The execution was properly excluded. (*Freeman on Executions*, 99, 100; 6 Wall. (U. S.) 556; 20 Kan. 264; 81 Ill. 34; 15 Wend. 578; 9 Mass. 95, 217; 11 Mass. 276; 2 Mass. 136; 17 Johns. 63; 10 Met. (Mass.) 185; 4 Colo. 190.)

HAYS, C. J.—The appellant was an acting constable of Hailey precinct, Alturas county, and on the twentieth day of June, 1883, a warrant of attachment was duly placed in his hands for service in an action against one Charles E. Bolton. It was duly served by him seizing and holding certain property of Bolton's. Afterward judgment was duly entered against said Bolton and an execution issued thereon, and directed "to the sheriff of Alturas county." The execution was delivered to defendant, in virtue of which he sold the attached property. Soon after the attachment Bolton assigned his estate to this plaintiff, who brought his suit against this defendant for the value of the goods theretofore seized. Defendant sought to justify by showing the goods were seized by him as constable under attachment proceedings against Bolton, and afterward sold upon the execution issued upon the judgment obtained in the attachment suit. When the defendant offered the execution in evidence plaintiff objected because it was not directed to B. F. Oliver, or to any constable, but was directed to "the sheriff of Alturas county." The court sustained the objection, and de-

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fendant duly excepted. The court also refused to permit defendant to show anything done by him as constable under the writ; all of which was duly excepted to.

It is conceded that the defendant was the officer who had served the attachment process, and that he held the property by virtue of that writ. It therefore follows, as matter of law, that he was the proper officer to whom the execution which sought to reach said attached property should issue, as he was the proper officer to make the sale. (Freeman on Executions, 62; *Clark v. Sawyer*, 48 Cal. 133.) Since all the property in dispute was that held under the attachment, the direction of the execution must therefore be treated as a direction to an improper officer, as it clearly was, so far as the subject matter of this action is concerned. The rule is laid down by Freeman on Executions, section 65: "Where a writ is directed to an improper officer, but executed by the proper officer, the error in the direction does not vitiate the writ, and may be cured by amendment." This position is abundantly sustained by the authorities. (Waples on Attachments, 141; *Hearsey v. Bradbury*, 9 Mass. 95; *Campbell v. Stiles*, 9 Mass. 217; *Lyon v. Fish*, 20 Ohio, 105; *Bank v. Franklin*, 20 Kan. 264; *Walden v. Davison*, 15 Wend. 575; *Hibberd v. Smith*, 50 Cal. 519.) It follows that the execution was not void, and the irregularity might have been cured.

Doubtless the better practice in such cases is to apply to the court from which the writ issues to amend the same. Such court would have the right, and it would be its duty, to correct the same; in this case, by directing it to the officer to whom it was doubtless intended to be given for service. But as this execution was amendable, and not void, we think the court erred in sustaining the plaintiff's objection. For the same reason we think the court erred in refusing to permit defendant to show delivery of execution to him. For these reasons we think the judgment should be reversed, and a new trial ordered.

Judgment reversed and cause remanded for further proceeding in accordance with this opinion.

Buck, J., concurring; Broderick, J., expresses no opinion.

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Argument for Respondent.

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(March 8, 1886.)

MOTHERWELL ET AL. v. TAYLOR.

[10 Pac. 304.]

**RESULTING TRUST—WHEN RAISED.**—A resulting trust is raised only when there is fraud in the acquisition of title, or where the money of one is used to pay for real property, the title to which is taken in the name of another at the time said title is taken, and neither a promise to pay nor after-payment will give rise to such a trust.

APPEAL from District Court, Alturas County.

J. B. Roseborough and L. Vineyard, for Appellants.

Defendant claims that when he made the purchase the Snow Fly was of no value, and the Davitt of small value; this only goes to the extent, and not to the fact and quality, of the fraud. Here, also, his acts refute his word, for soon afterward he bought and paid \$1,000 for a quarter of the latter without any new developments in either claim. Defendant, acting in the fiduciary relations aforesaid, having invested the means of the partnership loaned and advanced by him in the purchase of the interests in both claims, and taken a deed to half the Snow Fly in his own name, a resulting trust arose as to that which fastens itself upon his conscience against his wishing and intentions, in favor of these plaintiffs, and he is bound to share with them the profits thus derived in course of the trust. (2 Story's Equity Jurisprudence, secs. 1258-1260; *Murray v. Lyllburn*, 2 Johns. Ch. 441; 1 Perry on Trusts, secs. 124, 125, 128.)

George H. Roberts and F. E. Ensign, for Respondent.

It is claimed that certain of the findings are not supported by the evidence. There is no material point in the case in which there is not a substantial conflict in the testimony. Where there is a substantial conflict in the evidence, the supreme court will not disturb the decision of the court below. (Hayne on New Trial and Appeal, sec. 288, and cases cited; *Doe v. Vallejo*, 29 Cal. 390.) The appellate court will not disturb a judgment or verdict, or order denying a new trial, where there is a substantial conflict in the testimony, and no rule of law appears

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to have been violated. (*Mootry v. Hawley*, 1 Idaho, 543; *Cox v. N. W. Stage Co.*, 1 Idaho, 376.)

HAYS, C. J.—This action was brought to declare a partnership and a resulting trust in favor of the plaintiffs in certain mining property. The theory of the plaintiffs was that a mining partnership was entered into between plaintiffs and defendant, Frank Taylor, about the first day of August, 1882; and it is alleged by plaintiffs that at the same time defendant agreed to negotiate for, and if possible buy in, for the partnership, of one Joseph Taylor, a conflicting claim called the "Far West," in the Davitt mine; that on or about the eighteenth day of August, 1882, the defendant purchased said claim, together with an interest in the "Snow Fly" claim, then a prospect, for \$600; that the said sum of \$600 was by defendant loaned or advanced to the partnership, and security taken therefor upon the ores upon the dump and in sight in the Davitt mine; that afterward the \$600 so paid for the interest in the claim was repaid to Frank Taylor from the proceeds of the Davitt mine; that defendant, Frank Taylor, had fraudulently concealed from the plaintiffs the fact that he (defendant) had purchased an interest in the Snow Fly, and that plaintiffs did not ascertain the fact for more than a year after the transaction. The plaintiffs claim that by reason of these facts there was a resulting trust in their favor in and to the Snow Fly mining property.

The case was tried by the court, and the findings were, in substance, that there was no partnership entered into until after the purchase of the claim from Joseph Taylor; that the defendant, Frank Taylor, paid for the entire property purchased of Joseph Taylor from his (defendant's) own funds; that defendant did not take any security from plaintiffs for the money so paid for the claim; that the \$600 was, after the purchase, repaid from the proceeds of the Davitt mine; that there was no fraudulent concealment of facts on the part of the defendant, Frank Taylor; that all the agreement between the plaintiffs and defendant as to the partnership was made contingent upon the purchase of the conflicting claim; and that as it was not partnership funds that purchased the claims, there was no resulting trust in favor of the plaintiffs in the Snow Fly mining property. On the findings and conclusions of law, judgment was rendered

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Points decided.

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against the plaintiffs. Motion for new trial was overruled, and from the judgment and order overruling the motion for a new trial, the plaintiffs appeal to this court.

The question is, Was the money used by the defendant Taylor, in the purchase of the two claims, partnership funds? If it was not, then there is no resulting trust. As we understand the law applicable to this case, it was the payment of the purchase money at the time the title was obtained that would raise a trust of this kind, and neither a promise to pay nor after-payment is sufficient. Here the defendant paid his own money, and we cannot see that he took any security therefor. Certainly there was nothing said or done which would have made the plaintiffs personally liable to the defendant, Taylor, for the money; nor was there any note or other security in writing taken, nor property pledged and delivered to defendant. We conclude from the record that defendant purchased the claims with the view of getting his money back from the proceeds of the mine, if he could do so, and that there was no partnership at the time of the purchase. (*Ryan v. Dunphy*, 4 Mont. 342, 1 Pac. 711; *Snyder v. Wolford*, 33 Minn. 175, 22 N. W. 254.)

We have examined the record and see no error. Judgment of the court below is therefore affirmed.

Buck and Broderick, JJ., concurring.

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(March 8, 1886.)

LUFKINS v. COLLINS ET AL.

[10 Pac. 300.]

**VERDICT—EVIDENCE.**—The verdict of a jury against defendants in an action for the recovery of personal property is conclusive on appeal to the supreme court of the question of ownership, and also upon all the allegations in the complaint material to recovery in the action, if there is any evidence to sustain the verdict.



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**SPECIAL VERDICT OF A JURY.**—It is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question which the court may deem proper to submit to the jury.

**INSTRUCTIONS—VERDICT.**—When the instructions, taken as a whole, fairly submit the case to the jury, the verdict will not be disturbed on account of mere inaccuracies in some of the instructions given.

**APPEAL** from District Court, Alturas County.

Kimball & Heywood, for Appellants.

No brief on file.

G. L. Waters, L. Vineyard, J. B. Rosborough, and Brumback & Lamb, for Respondent.

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterward dispute that fact in an action against the person who has himself assisted in deceiving. (See the case of *Pickard v. Sears*, cited in Bigelow on Estoppel, 3d ed., p. 479, and note by Lord Denman, p. 479; 69 Ill. 452; 91 Ill. 58; 88 Ill. 452; 89 Ill. 491; 79 Ill. 187; 85 Ill. 96; 33 Mich. 92; 46 N. Y. 325, 7 Am. Rep. 341; 55 N. Y. 41, 14 Am. Rep. 173; 4 Met. 381, 38 Am. Dec. 376, and note.)

**BRODERICK, J.**—This case was here on appeal at the instance of defendants, and was decided at the January term, 1885 (ante, p. 150, 7 Pac. 95). The former judgment was there reversed, and the cause remanded to the court below for a new trial. The plaintiff again obtained a verdict and judgment, and from this judgment the defendants appeal.

The facts, as disclosed by the record, are substantially as follows: On and prior to the twenty-first day of November, 1882, the firm of Adams & Cunningham were the owners of seventy-one head of mules and horses used in teaming, and at that time the firm was engaged in teaming for Collins & Co., the defendants herein, with this plaintiff as boss or train-master, in the employ of said Adams & Cunningham, on the Oregon Short Line Railroad. On November 21, 1882, at Pocatello

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station, on the line of said road, Adams & Cunningham, being threatened with attachment suits, sold their stock and forwarding outfit to Collins & Co., defendants, and delivered to them a bill of sale, but the property was not there, and no part of it was delivered until the next day thereafter. The defendants and Adams then proceeded to the sixteen-mile station on the road, where they met the plaintiff with some of the property, and informed him of the transaction. On the twenty-second day of November, 1882, at the forty-three mile station on the road, the firm of Adams & Cunningham, by bill of sale and by actual delivery, sold to the plaintiff the five mules described in the complaint. While the negotiation was going on between plaintiff and Adams for the five mules, the defendant Stevens said to plaintiff that the sale of the property to defendants did not amount to much; that it was done to keep the work going on, and that he (plaintiff) could go ahead and purchase the mules, and thereby make himself secure. Immediately thereafter, and in presence of Stevens, the plaintiff selected the five head of mules, and he and Adams agreed upon the purchase price, and they were then and there delivered by Adams to the plaintiff. The delivery of the property was accomplished by a bill of sale executed by Adams & Cunningham. This occurred before the property had been delivered to the defendants. Adams then delivered to Stevens, for defendants, the other property, consisting of sixty-six head of stock and the forwarding outfit, and by agreement there made the plaintiff retained the control of the same for defendants, and continued in their employ as train-master. The plaintiff retained possession of the mules so purchased by him, and claimed and used them without objection from defendants until some time in January, 1883. On the nineteenth day of January, 1883, the defendants, while the plaintiff was absent, and without his consent, and by "force and arms," took and drove away the mules, claiming them under the bill of sale of November 21, 1882.

The action was brought to recover the property, and for damages, and the verdict was in favor of the plaintiff for the return of the property or \$1,000, the value thereof, and \$300 damages for wrongful detention of the same.

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On the trial of the case, among others, the following special question was submitted to the jury: "2. Was there a sale and delivery of the property in question for a valuable consideration by Adams & Cunningham to the plaintiff Lufkins? And if so, did the defendants assent or acquiesce in such sale and delivery?" This question was answered by the jury in the affirmative, and no other special verdict returned is in any manner inconsistent with this one. This special finding of the jury supports the general verdict, and is conclusive upon the question there submitted, if there is any evidence to sustain the finding.

At the trial defendants requested the court to instruct the jury to find specially on certain other questions, a part of which were submitted and others refused, and defendants excepted to the ruling upon the questions refused, and assign the same as error. By our code, section 385, it is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has a right to dictate the terms of such questions, and for refusing to comply with such request no error can properly be assigned.

There are a number of assignments of error in the record as to giving certain instructions to the jury, as well as to the refusal of the court to give others, which assignments need not be noticed in detail.

We are unable to find any error, either in the instructions given or refused.

Counsel for defendants urge that the court erred in refusing to give the last instruction requested, which is as follows: "On the undisputed facts in this case defendants are entitled to a verdict of no cause of action." This request was made on the assumption that there was no evidence in support of the plaintiff's claim. We have carefully examined the record, and are satisfied that this assumption is not well founded. There is some evidence to support the verdict, but we deem it unnecessary to comment thereon at length. The circumstances surrounding the parties, the apparent motive that governed the parties when the transactions were had, the apparent acquiescence of the defendants in the sale to plaintiff, the manner in which the defendants obtained possession of the property—in short, the whole case—is such that we think it was properly

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submitted on the evidence and instructions to the jury to determine who had the better right and title to the property. (*Silver Min. Co. v. McLaughlin*, 1 Idaho, 651; *Brown v. Brown*, 41 Cal. 88; *Trenor v. Railroad Co.*, 50 Cal. 222.)

We are further satisfied, in view of all the facts and circumstances of this case, that justice has been done, and that the verdict and judgment should not be disturbed. The judgment is therefore affirmed.

Hays, C. J., and Buck, J., concurring.

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(January 24, 1887.)

**STEVENSON v. SILAS W. MOODY, TERRITORIAL COMPTROLLER.**

[12 Pac. 902.]

**OFFICERS AND ATTACHES OF LEGISLATIVE ASSEMBLY—LIMITATION AS TO NUMBER.**—The number of officers and attachés of territorial legislative assembly is determined by the laws of the United States, and cannot be increased by any act of the legislative assembly itself.

**EXPENSES OF LEGISLATIVE ASSEMBLY—CANNOT PAY ATTACHES NOT AUTHORIZED.**—A territorial legislative assembly is limited in its expenses to the amount provided by Congress, and cannot appropriate money from the territorial treasury to pay attachés not authorized by the act of Congress.

Heard upon agreed statement of facts.

No briefs filed.

No attorneys named in record.

BUCK, J.—This controversy comes into this tribunal, as a court of original jurisdiction, upon an agreed statement of facts, under sections 20 and 780 of our Code of Civil Procedure. The statement of facts agreed upon by the parties, and submitted to the court, are: 1. That on the thirteenth day of December, A. D. 1886, the legislative council of Idaho territory pro-

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ceeded to elect such *attaches* as have formerly been elected; that the plaintiff was elected to a position designated by said council as "assistant chief clerk of the council," and that, as such clerk, he has rendered services for thirty-nine days; 2. That assistant chief clerks of the council, so called, have been elected by former assemblies of this territory; 3. That the duties devolving upon the chief clerk of said council are onerous in the extreme, and that public business is expedited by the employment of an assistant, and such assistance is necessary for the proper transacting of the business of the council; 4. That the plaintiff made the demand of the defendant, as comptroller of Idaho territory, for a warrant upon the general fund of the territory for the sum of \$195, claimed by him to be due him for said services, at the rate of five dollars per day, as said assistant chief clerk, and the defendant refuses to execute or deliver said warrant to plaintiff for the alleged reasons: 1. That there is no law of the United States creating or recognizing such subordinate officer of either branch of the legislative assembly of the territory; 2. That the laws of the United States forbid the payment of moneys belonging to this territory to any subordinate officers of the legislative assembly, for services rendered such assembly; 3. That the laws of the United States forbid the creation of such subordinate office by a legislative assembly; and 4. Because there is no law authorizing the comptroller to draw a warrant in payment for services rendered said assembly by persons not officers of said territory.

The following sections of the United States Statutes determine the powers and authority of our territorial assembly. "Sec. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. . . . Sec. 1855. No law of any territorial legislature shall be made or enforced by which the governor or secretary of a territory, or the members or officers of any territorial legislature, are paid any compensation other than that provided by the laws of the United States. . . . Sec. 1888. No legislative assembly of a territory shall, in any instance, or under any pretext, exceed the amount appropriated by Congress for its annual expenses."

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In the case of *National Bank v. County of Yankton*, 101 U. S. 129, Mr. Chief Justice Waite, in announcing the decision of the court, says: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. . . . The relation of the territories to the general government is much the same as that which counties bear to their respective states, and Congress may legislate for them as a state does for its municipal corporation. The organic law of a territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory, and binds the territorial authorities. Congress has full and complete legislative authority over the people of the territories, and all the departments of the territorial government."

It is clear from the inspection of the organic act of the territory, and from the decision of the supreme court of the United States, that the legislative assembly can be composed of such persons only as are provided by congressional enactment, and that the number of its officers and *attaches* is determined by the same power. A legislative assembly of the territory cannot increase the number of its members or officers or *attaches*, or the amount of their compensation, by any enactment of its own. If the length of time allowed for its session, or the number of its officers, is not sufficient, the relief must come from Congress. Section 1855 of the United States Revised Statutes limits the compensation of the members of the legislative assembly to a specified amount. Section 1888, in still more explicit terms, provides that the annual expenses of a legislative assembly shall not exceed, in any instance, or under any pretext, the amount appropriated by Congress. Section 1855 enacts that the amount of such compensation for any member or officer of a territorial assembly shall not be increased over the amount provided by Congress, and prohibits, in express terms, the making of a law for that purpose by such assembly.

In January, 1873, as appears by section 1861 of the Revised Statutes of the United States, assistant chief clerks of each branch of the legislative assembly of territories were expressly provided for. In 1878, however, by act of Congress passed

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Points decided.

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June 19th (20 U. S. Stats. 193), said section was repealed, and it was provided that the subordinate officers of each branch of the territorial legislature shall consist of a chief clerk, enrolling and engrossing clerk, sergeant-at-arms, and doorkeeper, messenger, and watchman, and chaplain. The office of assistant chief clerk was not included within this new enumeration of *attaches* to the legislative assembly. We must presume that this omission was intentional.

From an inspection of the several sections of the United States Statutes, and the decisions of the supreme court of the United States, it seems clear that the election of an assistant chief clerk of the council was not authorized by law; that the joint resolution of the legislative assembly, providing for the payment of such officer out of the territorial treasury, was contrary to the laws of the United States, and void; and that the territorial comptroller is not authorized by law to draw a warrant upon the territorial treasurer for the payment of plaintiff as said assistant clerk.

Upon the above conclusions of law, and the stipulation of parties herein, this controversy is dismissed.

Hays, C. J., and Broderick, J., concurring.

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(February 7, 1887.)

HEILNER ET AL. v. BROWN.

[12 Pac. 903.]

**NEW TRIAL—AFFIDAVIT OF NEWLY DISCOVERED EVIDENCE—INSUFFICIENT JURAT.**—Where an affidavit was produced and read in the district court, without objection, on motion for a new trial, on the ground of newly discovered evidence, and an objection is made in this court that the same is insufficient and void for want of a sufficient jurat, *held*, that this court will not consider the objection that it should first have been made in the court below.

**SAME.**—An order for a new trial on the ground of newly discovered evidence, being largely discretionary with the trial judge, *held*, this court will not disturb the same, unless appellant shows an abuse of such discretion.

(Syllabus by the court.)

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Opinion of the Court—Hays, C. J.

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## APPEAL from District Court, Washington County.

G. W. Adams and Brumback &amp; Lamb, for Appellant.

An affidavit on motion for a new trial that is not sworn to is not sufficient. (*McDermaid v. Russell*, 41 Ill. 489; *Ladow v. Groom*, 1 Denio, 431; *People v. Sutherland*, 81 N. Y. 5-8; *Knight v. Elliott*, 22 Minn. 551; *Tunis v. Withrow*, 10 Iowa, 307, 77 Am. Dec. 117.) An affidavit on motion for a new trial is not sufficient that alleges "that affiant could not, with reasonable diligence, have discovered and produced said evidence at such former trial." It must set forth the acts constituting the diligence used, or reason for not performing such acts, so the court may judge of the same. (*Wilkes v. Wolback*, 30 Kan. 375, 2 Pac. 508; *People v. Cummings*, 57 Cal. 88; *Stoakes v. Monroe*, 36 Cal. 388; *Fenno v. Chapin*, 27 Minn. 519, 8 N. W. 762, 763; *Chapman v. Moore*, 107 Ind. 223, 8 N. E. 80; *Pinschower v. Hanks*, 18 Nev. 99, 1 Pac. 454; *People v. Jones* (Cal.), 8 Pac. 611; *Carson v. Henderson*, 34 Kan. 404, 8 Pac. 727; *People v. Superior Court*, 5 Wend. 115, 10 Wend. 286; *Hopper v. Moore*, 42 Iowa, 563; *People v. Cummings*, 57 Cal. 88.)

Huston &amp; Gray, for Respondents.

No appeal lies from an order granting a new trial, as such order is not a "final decision," within the meaning of the Revised Statutes of the United States, section 1869. (*Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. Rep. 15; *Coughlin v. District of Columbia*, 106 U. S. 11, 1 Sup. Ct. Rep. 37; *Baker v. White*, 92 U. S. 176-179; *McComb v. Commissioners*, 91 U. S. 1; *Davis v. Crouch*, 94 U. S. 514.) Confessions and statements of defendant are not cumulative evidence. (*Parker v. Hardy*, 24 Pick. 246; *Gardner v. Mitchell*, 6 Pick. 116; *Chatfield v. Lathrop*, 6 Pick. 417; *Flannagan v. Newberg*, 1 Idaho, 84; *Gray v. Harrison*, 1 Nev. 509; *Wall v. Trainer*, 16 Nev. 131-135.)

HAYS, C. J.—This is an appeal from an order granting a new trial. The grounds of the motion for a new trial were irregularity in the proceedings of the court, newly discovered



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evidence, insufficiency of the evidence, and errors in law. The appellants contend that the affidavit of J. Durkheimer, produced and read in the court below on the motion for a new trial on the ground of newly discovered evidence, was insufficient and void on account of not having a proper jurat thereon. It was read and treated as an affidavit in the court below without objection, and counsel cannot be heard to raise such an objection for the first time in this court. If it was defective, they should have objected to it in the court below, and, if overruled, they could have excepted, and been heard here. While courts look with disfavor on motions for new trial, on the ground of newly discovered evidence, yet the court below must be clothed with large discretionary powers in such cases, and, if there is no abuse of that discretion, the appellate court will not interfere. We find no abuse of that discretion in this case, but think the order a very proper one. This being decisive of the question, other points discussed will not be considered.

The order is affirmed.

Buck and Broderick, JJ., concurring.

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(February 7, 1887.)

ROSENTHAL ET AL. v. IVES ET AL. and LANSDALE ET AL.  
v. IVES ET AL.

[12 Pac. 904.]

**MINING CLAIM—ADVERSE CLAIM—RIGHT TO PATENT—SHOWING TO BE MADE.**—In an action brought under section 2326 of the Revised Statutes of the United States, and the act of 1887, amendatory thereof, in support of an adverse mining claim, it is not enough that one claimant should show a superior right or title, as against the other, but one must show a clear right, as against the government, to a patent from the United States to the claim in dispute or some part thereof, before either party can prevail in the action.

**ALIENS CANNOT LOCATE CLAIM.**—Under the acts of Congress only citizens of the United States and persons who have declared their intention to become such can acquire any right by location upon mineral lands of the public domain.

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Argument for Appellants.

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**FINDINGS—MUST ALLEGE AND PROVE CITIZENSHIP.**—In an action between claimants to determine the right of possession to a mining claim the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that the plaintiffs are citizens, or have declared their intention to become such, and when the action is tried to the court alone all these facts must be found, whether admitted by the pleadings or not.

**SAME.**—As there was an omission to find in these cases that plaintiffs were citizens, or had declared their intention to become such, *held*, that the judgment should be reversed and the causes remanded, with direction to the court below to find on this question from the evidence taken at the trial, if sufficient, and if not, upon such evidence as may be adduced, and proceed to render judgment accordingly.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County.

Charles W. O'Neill, for Appellants.

The consolidation and trial of the two causes as one case was unauthorized by law and improper, even with the consent of parties. (Code, sec. 713; *Wallace v. Eldredge*, 27 Cal. 498.) Actions brought pursuant to section 2326 of the Revised Statutes of the United States are virtually applications for a patent for the ground in controversy; and it is incumbent upon a party to such action to show every fact essential to the initiation and perfection of any right claimed by him under the act of May 10, 1872, and to entitle him to the possession of the ground, not only against the defendant, but against the general government. (*Golden Fleece etc. Min. Co. v. Cable Consol. etc. Min. Co.*, 12 Nev. 312; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Mining Co. v. Brown*, 10 Saw. 243, 21 Fed. 167; *Gelcich v. Moriarty*, 53 Cal. 217; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110; *Steel v. Mining Co.*, 18 Nev. 80, 1 Pac. 448.) The performance of annual labor is necessary to hold a placer claim. (*Carney v. Mining Co.*, 65 Cal. 40, 2 Pac. 734.) An alien can neither locate, possess, nor acquire title under patent to the mineral land of the United States. (*Tibbitts v. Ah Tong*, 4 Mont. 536, 2 Pac. 759; *Chapman v. Toy Long*, 4 Saw. 28, Fed. Cas. No. 2610; *Golden*

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Opinion of the Court—Broderick, J.

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*Fleece etc. Min. Co. v. Cable Consol. etc. Min. Co.*, 12 Nev. 312.) The possessory right to the mineral lands of the United States may be acquired, in the absence of local rules, by a bare compliance with the act of Congress. (*Golden Fleece etc. Min. Co. v. Cable Consol. etc. Min. Co.*, 12 Nev. 312.)

William H. Claggett, for Respondents.

The consolidation of the two causes was proper. (Code Civ. Proc., sec. 713; *Cariaga v. Dryden*, 29 Cal. 308; Code Civ. Proc., sec. 196.) A finding is not necessary on any fact that is expressly admitted, or not denied in the pleadings. (*Swift v. Muygridge*, 8 Cal. 445; *Fox v. Fox*, 25 Cal. 588; *Taylor v. Palmer*, 31 Cal. 256.) The laws of the United States do not require \$100 to be annually expended upon a placer claim. (U. S. Rev. Stats., sec. 2324.) Forfeiture and a relocation thereunder must be specially pleaded. (*Morenhaut v. Wilson*, 52 Cal. 268; *Water Co. v. Mooney*, 12 Cal. 534; *Richardson v. McNulty*, Blanch. & W. Lead. Cas. 225, notes; *Pralus v. Mining Co.*, 35 Cal. 35.) The law of 1866 was intended to extend to the customary law of the miners the legal protection of the government. (*Broder v. Water Co.*, 101 U. S. 276; *Basey v. Gallagher*, 20 Wall. 683; *Jennison v. Kirk*, 98 U. S. 456, 457.)

BRODERICK, J.—These actions were commenced in support of the adverse claims made by the plaintiffs against the issuance of patents to Ives and Silverthorn to the Idaho Bar claim, in Shoshone county, Idaho. The two cases were, by consent of the parties, consolidated, and tried by the court without a jury. The court found and adjudged that Ives and Silverthorn were, as against the plaintiffs in each of said cases, the owners of, and entitled to the possession of, a certain portion of the claim, which was described in the judgment; that the plaintiffs in the Lansdale case were the owners of, and entitled to the possession, as against the defendants, of that portion of the Idaho Bar claim more than eighty rods distant from the west line thereof, which conflicted with the lower half of the Murray location; that the plaintiffs in the Rosenthal case were the owners of, and entitled to the possession, as

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against the defendants, of all the area in conflict with the upper half of the Murray location; that Ives and Silverthorn be enjoined and restrained from asserting or claiming any right, title, interest, or estate in any of the two parcels herein adjudged to be the property of the plaintiffs in the consolidated cases, respectively, and from prosecuting their application for a United States patent to any portion of said parcels of land.

From this judgment Ives and Silverthorn appeal to this court, and assign as error: 1. That the consolidation and trial of the two cases as one was unauthorized by law, and improper, even with the consent of the parties; 2. That the findings do not show that Murray (one of the original locators) was a citizen of the United States, or had declared his intention to become such, nor that the plaintiffs in either of said cases were citizens of the United States, or had declared their intention to become such; 3. That the findings fail to show that the plaintiffs in either of said cases, or their predecessors in interest, ever complied with the requirements of section 2324 of the Revised Statutes, and the several acts amendatory thereof, as to performing the annual labor required by those acts, during A. D. 1884; 4. The finding that there was a mining custom in force, at the date of the Ives location, limiting all placer claims in that locality to eighty rods in length to each locator; that no exceptions to this custom were allowed by the custom itself; that the Ives location was made in violation of this custom, and was void as to the excess in length beyond eighty rods from its beginning point.

We will notice these questions in their order.

The consolidation of the cases below for the purposes of the trial, by the consent of the parties, is certainly no ground for reversal. The defendants were the same in both cases, and the questions involved the same. The consolidation and trial as one case saved costs to all the parties, and, if the order was error, it was without prejudice. At least, there has been no claim here that any prejudice resulted therefrom. In such a case a party should not be heard to complain here of that to which he assented in the court below.

The second question, as to the omission to find that Murray or the plaintiffs in either of the cases were citizens, or had de-

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clared their intention to become such, is more difficult. It appears from the record that in the Rosenthal case the citizenship of Murray and plaintiffs is alleged, and not denied. In the Lansdale case the citizenship of plaintiffs is alleged, denied by the defendants, and hence put in issue. It further appears that on October 13, 1885, after the rendition of the judgment, appellants stipulated in open court that the Lansdale case should "abide and be controlled by all orders, decisions, and judgments in the Rosenthal case."

It is contended, on behalf of the respondents, that the judgment in the Rosenthal case should be affirmed (so far as this point is concerned), because the citizenship of Murray and the plaintiffs is admitted, or not denied; and also that the judgment in the Lansdale case should be affirmed, because under the stipulation it was to abide and be controlled by the decision and judgment here in the Rosenthal case. In ordinary cases, this point made by counsel would have to be sustained, as it is a general rule, well recognized, that what is admitted by the pleadings is taken as proven, and that which is alleged in the complaint, and not denied by the answer, is considered admitted, as between the parties. But these are statutory actions, brought under an act of Congress, and must be controlled by its provisions. It is true that it is a contest between parties to settle the right of possession to mining ground, but the act provides that, after a judgment is rendered, the party entitled to the possession of the claim, or any part thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor general, etc., and make the payments required; "whereupon the whole proceedings and the judgment-roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess." The amendatory act of 1881 provides that if, upon the trial, neither party appears to be entitled to the claim in dispute, nor any part thereof, this fact must be found, and judgment rendered accordingly.

From a consideration of these provisions, it is clear that the object and purpose of the action is not only to settle the contro-

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versy as between the claimants, but for the information of the officers of the land department of the general government. It is not enough that one party should show the better or superior title, as against the other claimant, but one party must show clearly, as against the government, the right to a patent for the disputed ground, or some part thereof, before either claimant can prevail in the action. (*Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 625; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 653, 660.)

The citizenship of Murray and the plaintiffs was pleaded, and we think there should have been a finding upon this allegation of the complaint, notwithstanding the admissions of the defendants. We must not be understood as deciding that in all actions the trial court must find upon allegations which are admitted by the parties, but we limit our conclusions in this regard to this particular class of cases. (*North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522.)

As to the third assignment of error, we think the findings show a sufficient compliance on the part of the plaintiffs with the requirements of law as to performing the necessary labor upon the claim.

This brings us to the fourth and last question to be considered. Was it error to find the existence of a mining custom at the date of the Ives location, limiting all placer claims in that locality to eighty rods in length, and will this finding support the conclusion of law based thereon? Rules and customs of miners, reasonable in themselves, and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as a part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question in any way conflicts either with the acts of Congress, or the laws of the territory, but, on the contrary, think the custom a reasonable one, and entirely in harmony with the spirit of the laws. (U. S. Rev. Stats., sec. 2319; Idaho Code Civ. Proc., sec. 486; *Smelting Co. v. Kemp*, 104 U. S. 652; *Erhardt v. Boaro*, 113 U. S. 535, 5 Sup. Ct. Rep. 560; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522.)

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Argument for Appellant.

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We find no error in the record, except the omission to find on the question of citizenship; and, to have this omission supplied, the judgment is reversed, and the causes remanded to the court below, with directions to find upon this question on the evidence taken at the trial, if sufficient, and, if not, upon such evidence as may be adduced, and render judgment accordingly.

Hays, C. J., and Buck, J., concurring.

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(February 7, 1887.)

TAGE, ADMINISTRATOR, v. ALBERTS.

[13 Pac. 19.]

**PRACTICE—FINDINGS OF COURT.**—If in an action of fraud the findings of the court are sufficient to sustain the judgment, the fact that the court fails to find upon certain allegations in the complaint which, if found true or not true, would not affect the result, is no cause for a new trial.

**SAME.**—In such actions findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues, and not objectionable as being outside thereof.

**APPEAL** from District Court, Ada County.

Brumback & Lamb, for Appellant.

A judgment based upon findings which do not determine all the issues is a decision against law. (*Knight v. Roche*, 56 Cal. 17; *Brady v. Bartlett*, 56 Cal. 364; *Billings v. Everett*, 52 Cal. 661.) Where specific facts are put in issue, it is the duty of the court to find the facts specifically. (*Hihn v. Peck*, 30 Cal. 286; *Pratalongo v. Larco*, 47 Cal. 382; *Breeze v. Doyle*, 19 Cal. 104; *Hidden v. Jordan*, 28 Cal. 301; *Jones v. Block*, 30 Cal. 228; *Polhemus v. Carpenter*, 42 Cal. 386.) The specific facts constituting a fraud must be pleaded. (*Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132; *Green v. Hayes*, 70 Cal. 276, 11 Pac. 716; *United States v. Atherton*, 102 U. S. 372; *Misner v. Knapp*, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65.) The cause of

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action established by the findings must be the cause of action set out in the complaint; otherwise, judgment will be reversed. (*Mondran v. Goux*, 51 Cal. 152; *Green v. Chandler*, 54 Cal. 626.) The findings must cover every material issue raised by pleadings. (*Cummings v. Peters*, 56 Cal. 593; *Everson v. Mayhew*, 57 Cal. 144; *Packard v. Johnson*, 57 Cal. 182, 183; *Robinson v. Railroad Co.*, 57 Cal. 419.)

Huston & Gray, for Respondent.

One who deals in property matters with an aged and feeble person is bound to prove the fairness of the transaction. (Bigelow on Frauds, 282; *Wartemberg v. Spiegel*, 31 Mich. 400; *Ellis v. Mathews*, 19 Tex. 390, 70 Am. Dec. 353.) Equity will set aside a contract for the sale of real estate and a conveyance thereunder when it appears that the capacity for business on the part of the grantor has been greatly weakened by trouble and distress of mind, and the price was grossly inadequate. (Bigelow on Frauds, 283; *Perkins v. Scott*, 23 Iowa, 237.) Where inadequacy of consideration or undue influence is joined to imbecility or weakness of mind, arising from old age, sickness, intemperance, or other cause, equity will set aside the transaction at the suit of the injured party. (Bigelow on Frauds, 283 et seq., and notes; *Tracy v. Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610; *Crawford v. Hoeft*, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, and 26 N. W. 870; Cooley on Torts, 515, 516; *Oakey v. Ritchie*, 69 Iowa, 69, 28 N. W. 448; *In re Disbrow's Estate*, 58 Mich. 96, 24 N. W. 624, and note.) Evidence that parties lived together in adulterous intercourse is pertinent as one of several facts to prove the prevalence of undue influence. (Bigelow on Frauds, 500, 501 et seq.; Cooley on Torts, 515.)

BUCK, J.—This action was brought to set aside a deed from plaintiff to defendant, on the ground that it was procured by fraud. Decree was granted, setting aside the deed, and from the decree and order denying a new trial appeal is taken. The appellant specifies three errors upon which he relies: 1. That the court erred in excluding evidence offered by the defendant that he had furnished the money that purchased the



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property conveyed by the deed. The record shows that the offer was to show that defendant had given money to plaintiff, from time to time, which was used by her in the purchase of property. He did not offer to show that he had loaned or furnished her money with the understanding that it was to be used to purchase the property. She had a right to use her own money as she chose, whether she received it from the defendant or others. We think the evidence clearly incompetent.

2. Appellant claims that the evidence was insufficient to support the sixth, seventh, ninth, tenth, eleventh, thirteenth, and fourteenth findings of fact. Upon an examination of the testimony we find evidence upon the subject matter of each of these findings. Some of it is undisputed, and where there is a conflict we think the credibility of the witnesses a matter for the trial judge, and we see no ground for disturbing the decision of the court thereon.

3. That some of the findings are outside of the issues, and that those actually found do not cover the issues raised by the pleadings. This objection suggests the question, What are the material issues in the case? The citation from 1 Daniell's Chancery Practice, in appellant's brief, states that, in actions of fraud, "everything intended to be proved should be stated, otherwise evidence cannot be admitted to prove it." (1 Daniell's Chancery Practice, 335.) Accepting this as correct, yet it does not follow that everything alleged in a pleading will be proven upon the trial, or that every allegation must be sustained by evidence before fraud can be established. (Bigelow on Frauds, 490, 493.) The gravamen of plaintiff's alleged cause of action is that "on the twenty-seventh day of May, 1884, defendant, fraudulently taking advantage of plaintiff's incapacity resulting from sickness and disease, caused her to execute a certain deed, whereby she conveyed to him certain real estate." The charging part of the complaint is as follows: "That the plaintiff being then sick, weak, and enfeebled from disease and prolonged sickness and confinement, and believing she had but a short time to live, and plaintiff being an illiterate person, and unable to read or write, the defendant on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured her to sign a certain writing, without paying her any consideration therefor,

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and which writing he falsely and fraudulently represented to be a will of the plaintiff, and purporting to devise her property as she had theretofore directed." In the decision of the court there is no finding upon the allegation that defendant fraudulently represented to plaintiff that said deed was a will. The failure to find upon this allegation is assigned and insisted upon as error. .

In *Schroeder v. Jahns*, 27 Cal. 281, the court says: "While agreeing with counsel that the court must find as to the truth of every issue of fact found in the case, we think the finding need not be directly and pointedly made that each of the several allegations of the complaint or answer is not true. But if the court finds such facts as will be sufficient . . . to necessarily determine every material issue in the cause, the requirement of the law will, in that respect, be satisfied." (See, also, to the same effect, *Bigelow on Frauds*, above cited.)

In the case at bar the court finds that on the twenty-seventh day of May, 1884, the plaintiff was the owner of certain real estate of the value of \$1,500; that on said day she made the deed, whereby she conveyed it to the defendant for the consideration of two dollars; that, at the time she made the deed, the plaintiff was so sick, weak, and enfeebled, both mentally and physically, by disease and prolonged sickness, that she did not know or comprehend what kind of an instrument she was signing; that she had been a prostitute for years, and that the only relation existing between her and defendant were those resulting from illegal cohabitation; that prior to the making of the deed the defendant had been very assiduous in his attentions to plaintiff, and that after said deed was procured his attentions almost entirely ceased; that the property conveyed by the deed constituted plaintiff's entire estate; that she had eight children; that a short time before the making of said deed she had made a will devising said property to her children, and that a few days before the execution of said deed, with the assistance of defendant, she had destroyed said will; that said deed was executed about midnight, before a notary who had been sent for at the request of the defendant, there appearing no necessity for such unusual proceedings or haste; that plaintiff did not know the character of the instrument that she had

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signed until about the 30th of September, four months after its execution; and that, having ascertained that she had executed a deed to her property, she demanded of defendant that he reconvey the same to her, and upon his refusal so to do, she commenced this action to recover the same; and that said deed was obtained of plaintiff by fraud by defendant. It is maintained by appellant that some of these findings are outside of the issues, and that findings outside the issue will not sustain a judgment. The legal proposition that findings outside the issue will not sustain a judgment is probably correct, and we think it is also correct that findings outside an issue will not impair a judgment entered upon sufficient findings responsive to the issues. In the case at bar we think the findings are all responsive to the issues, although the subject matter of them may not all have been alleged in the pleadings. It is said in Bigelow on Frauds, 482, that "fraud may be proved either by intrinsic evidence of unfairness in the transaction itself, or by evidence of facts and circumstances attending it." (3 Lawyers' Briefs, p. 583, sec. 577.)

In the citation from Daniell's Chancery Practice heretofore made it is said "that everything intended to be proved must be alleged"; but this would hardly be construed to mean that all the evidence by which it was to be proved must be pleaded. In the case at bar the *gravamen* of the charge is that, the plaintiff being sick and enfeebled, the defendant took advantage of her condition, and procured the deed. The fact that the plaintiff had eight children to whom a few days before she had willed her property; that the defendant had assisted her to destroy said will; that defendant had sent for a notary at midnight, without any apparent necessity for haste, to have the deed executed—are circumstances properly admitted in evidence, and, if competent evidence, we think findings upon them would be responsive to the issues. Appellant claims that defendant is entitled to a finding as to the allegation in the complaint that he falsely represented to plaintiff that the deed was a will. While a finding that such allegation was true might serve to make the fraud more apparent, yet the finding that it was not true could hardly relieve the defendant from the effect of the other findings in the case. The complaint does not in terms

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Points decided.

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limit the acts of the defendant to the alleged false representations as to the character of the deed. It alleges that defendant took advantage of the condition of the plaintiff, and induced her to sign the deed without consideration, and falsely represented to her that the deed was a will. Without a finding upon the false representations, we think enough was found to sustain the judgment under the authorities cited. It is also claimed by appellant that, if the direct misrepresentation by defendant as to the will is not found, the remaining facts as alleged and found constitute constructive, rather than actual, fraud as alleged in the complaint. Actual fraud is defined to be the intentional and successful employment of any cunning or artifice used to circumvent another. (3 Lawyers' Briefs, p. 568, sec. 558.) We think the facts found by the court clearly come within this definition.

We find no error, and the judgment below is affirmed.

Hays, C. J., and Broderick, J., concur.

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(February 7, 1887.)

BLACK v. CITY OF LEWISTON.

[13 Pac. 80.]

**NONSUIT.**—Where there is evidence to support the case a nonsuit will not be granted.

**NEGLIGENCE—DEFECTIVE STREET.**—Where an injury occurs to the plaintiff on the Sabbath day, through the negligence of the defendant in not keeping its streets in proper condition, *held*, that the plaintiff was not required to show that he was engaging in a work of necessity at the time of the accident in order to entitle him to recover, and a motion for nonsuit on that ground was properly overruled.

**EXCEPTIONS.**—Where the court gives a general charge to the jury, and the charge contains various propositions of law and a general exception only is taken, *held*, that the exception is not sufficient.

APPEAL from District Court, Nez Perces County.

Brumback & Lamb, for Appellant.

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Argument for Respondent.

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A dedication of a street must be by the owner of the land or of an interest therein. (2 Dillon on Municipal Corporations, secs. 635-637; *Irwin v. Dixon*, 9 How. 10; *Lee v. Lake*, 14 Mich. 12, 90 Am. Dec. 220; *Leland v. Portland*, 2 Or. 46; *Baugan v. Mann*, 59 Ill. 492; *Dovaston v. Payne*, 2 Smith Lead. Cas. 95; *Detroit v. Railroad Co.*, 23 Mich. 173; *United States v. Chicago*, 7 How. 185.) There must be an intent upon the part of the owner to dedicate, and this intent should clearly and satisfactorily appear. (*Irwin v. Dixon*, 9 How. 10; *San Francisco v. Canavan*, 42 Cal. 541; *Fisk v. Havana*, 88 Ill. 208; *Grube v. Nichols*, 36 Ill. 92; *Rees v. Chicago*, 38 Ill. 322; 2 Dillon on Municipal Corporations, 636, note 4, and cases there cited.) To constitute an implied acceptance, repairs must be made and ordered, or knowingly paid for by the authority which has legal power to adopt the street. (*State v. Bradbury*, 40 Me. 154; *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Bridge Co. v. Bachman*, 66 N. Y. 261; *Town of Dayton v. Town of Rutland*, 84 Ill. 279, 25 Am. Rep. 457; *People v. Jones*, 6 Mich. 176; *Guthrie v. New Haven*, 31 Conn. 308; *Des Moines v. Hall*, 24 Iowa, 234; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Wisby v. Bonte*, 19 Ohio St. 238.) The jury are the exclusive judges of the facts, and it is erroneous for the court to assume, in its instructions to the jury, that a certain fact exists, and then submit to them the question whether or not it does exist. (*Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131; *Wood v. Tomlinson*, 53 Cal. 720; *Bradley v. Lee*, 38 Cal. 362; *Crawford v. Roberts*, 50 Cal. 235; *McNeil v. Barney*, 51 Cal. 603; *Stone v. Mining Co.*, 52 Cal. 315.)

Silas W. Moody, for Respondent.

If the right to injure is claimed as a punishment for traveling on the Sabbath, this right does not belong to the city of Lewiston. "Vengeance is mine; I will repay, saith the Lord." (Bible, tit. "Romans," c. 12.) If the right to punish respondent is claimed by appellant for his earning his subsistence by assisting to harvest a wheat crop on the Sabbath, we cite: "It is lawful to do well on the Sabbath day." (Bible, tit. "St. Matthew," c. 12.) Appellant having excepted to the whole

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instruction, and having failed to specify what portion thereof is excepted to before the jury retired, is estopped from assigning error here. (Thompson on Charging the Jury, pars. 115, 116; Hayne on New Trial and Appeal, sec. 129; Code Civ. Proc., sec. 402; *Brown v. Kentfield*, 50 Cal. 130; *Robinson v. Railroad Co.*, 48 Cal. 425; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103, and note.)

HAYS, C. J.—The charter of the city of Lewiston gives to that corporation, among its powers, the right to control all streets, highways, squares, and other public grounds within its limits; and provides that it shall be liable to anyone for any injury to any person growing out of any casualty or accident happening to any such person on account of the condition of any street or public ground therein. The plaintiff claims to have been greatly injured by falling into a hole which the city had negligently suffered to remain in one of its public streets; that it occurred in the night-time, while he was lawfully traveling along the public highway, and he was free from fault or negligence. All of which is denied by the defendant. The case coming on for trial, a jury was duly called; and, when plaintiff rested, the defendant moved for nonsuit on the grounds hereinafter stated, which motion was denied, and the defendant now assigns such ruling as error.

After submission of all the testimony and arguments of counsel, in the court below, the learned judge who there presided charged the jury at considerable length, evidently intending to give them all the law that was necessary for their information in the consideration of the case. To which said instructions, and the whole thereof, counsel for defendant excepted. There was no specific exception to any particular portion of the charge, nor did counsel seek to point out or inform the court wherein he claimed the instructions to be wrong, but contented himself with a general exception to the whole instruction. It is not claimed or contended but that many of the propositions of law given by the court were correct. While the instructions, as a whole, very fairly present the law of the case, some specific parts of an instruction perhaps might be open to criticism, and these specific portions appellants here assign as error, and ask

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a reversal on that ground. We think the exceptions taken entirely too general to be available to the defendant on appeal. The rule seems to be well settled in the federal and most of the state courts, and we now adopt it as the rule of this court, that the supreme court will not review the charge of the district judge unless his attention has been called by exceptions specially to those particular portions complained of. The necessity for such a rule is apparent. In the hurry of jury trials in the district courts, it must often happen that the judge prepares his charge hastily, and without an opportunity for that investigation and deliberation which is desirable; and it would be unjust to him, and a wrong to suitors, if an error inadvertently committed, and which the judge would have perceived and corrected had his attention been called to it, should be allowed to work a reversal of the judgment. If the party thinks the charge wrong in any particular, let him call the judge's attention to it at the time, and give an opportunity for correction, thus saving the necessity for an appeal.

Justice Harlan, in delivering the opinion of the supreme court of the United States in *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. Rep. 119, said, in speaking on this subject: "The attention of the court should be called to the particular point by something more definite than the general exception taken." Substantially the same was held in *Beckwith v. Bean*, 98 U. S. 284, *Beaver v. Taylor*, 93 U. S. 46, and in many other cases. Again, the same court holds that a general exception to a charge, which did not direct the attention of the court to the particular portion of it to which the objection is made, raises no question for review in the appellate court. (*Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. Rep. 960.)

In Iowa it has been held that an exception to all the instructions in a mass raises no question for the consideration of the supreme court. (*Pitman v. Molsberry*, 49 Iowa, 339; *McCaleb v. Smith*, 24 Iowa, 591.)

In *Nisbet v. Gill*, 38 Wis. 657, the defendants excepted "to each and every part of the judge's charge to the jury"; and the court said: "Under repeated decisions of this court, if the charge is correct in any material particular, such an exception

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is entirely insufficient to authorize us on an appeal to review the charge." The same court says: "General and sweeping exceptions to anything resting in detail will be disregarded here, when any single detail is correct." (*University v. Shanks*, 40 Wis. 352.) Such is the settled rule in that state, and the same has been adopted substantially in California.

In *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103, and note, that court says: "We take this occasion to remark that exceptions to a charge ought to point out the specific portions excepted to, and to be made at the time of the trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial." This was approved later. (*Robinson v. Railroad Co.*, 48 Cal. 409.)

In New York it is held that a general exception to a charge containing distinct propositions is unavailing, unless the party excepting can show that each proposition is erroneous, to his prejudice. (*Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350, and note; *Stone v. Transportation Co.*, 38 N. Y. 240.) An exception to the whole, and to each and every part of a charge, is equally unavailing, if any part of the charge is correct. (*Jones v. Osgood*, 6 N. Y. 233; *Caldwell v. Murphy*, 11 N. Y. 416.)

In Kansas, where the court gave a general charge to the jury, and the charge contained various propositions of law, and a general exception only was taken to the charge, it was held that the exception was not sufficient. (*Fullenwider v. Ewing*, 25 Kan. 69, and cases there cited; *Bailey v. Dodge*, 28 Kan. 72.)

Many other states have adopted this rule, but we think the wisdom of it so evident that it is unnecessary to cite authorities further in its support.

When the plaintiff rested, a nonsuit was asked by defendant on the following grounds: 1. That the plaintiff has not proved that said road mentioned in the complaint as the "Camas Prairie Road" is within the limits of the city of Lewiston, or that the same had ever been adopted by the common council of said city, by any ordinance thereof, as a public street, highway,



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or thoroughfare, or that the same has been ordered opened up by any ordinance of said council, or that it has ever been dedicated as a public ground; 2. That the proof shows that plaintiff was guilty of contributory negligence sufficient in law to prevent him from recovering; 3. The proof shows that said accident, if any occurred, took place on Sunday, and there is no proof that plaintiff was engaged in a work of necessity.

As to the first ground, there was ample proof to go to the jury on that point.

As to the second ground, if the undisputed facts showed contributory negligence, it would then have been the duty of the court to grant the motion; but, if there was a question of fact in dispute or doubt, it was for the jury to find from the evidence, and the court very properly denied the motion.

The third ground for nonsuit cannot be entertained. The fact that the accident happened to the plaintiff on the Sabbath day will not prevent him from recovering, since that was not contributory negligence.

And the plaintiff should not be nonsuited unless it appears that the evidence in his behalf, upon the most favorable construction that the jury would be at liberty to give it, would not warrant a verdict for him. It has become the settled law of this court that it will not disturb a judgment, or order denying a new trial, as being against the evidence, where there is a substantial conflict in the testimony, and no rule of law appears to have been violated. (*Mootry v. Hawley*, 1 Idaho, 543; *Ainslie v. Printing Co.*, 1 Idaho, 641.)

While the application for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court, the authorities seem to agree that such application should be looked upon with suspicion and disfavor because of the temptation to make a favorable showing after having sustained defeat, and certainly we find nothing in this application to have warranted the granting of a new trial.

The evidence seems to have fully warranted the verdict, and the amount seems reasonable, in view of the dreadful accident to the plaintiff occurring through the defendant's fault.

Finding no error, the judgment is affirmed.

Buck and Broderick, JJ., concurring.

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Argument for Respondents.

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(February 14, 1887.)

## DARBY v. HEAGERTY ET AL.

[13 Pac. 85.]

**PRACTICE—RULE OF COMMON LAW REVERSED.**—Section 3 of our Code of Civil Procedure reverses the rule of the common law that statutes in derogation of the common law must be strictly construed. Under our code such statutes are to be liberally construed with a view to promote justice.

**DEPOSITION—PRESUMPTION IN FAVOR OF OFFICE TAKING.**—In determining the admissibility of a deposition taken under the provisions of our Code of Civil Procedure, the presumption is that the commissioner discharged his duty by doing all that the statute requires, except as to matters which he must return specifically as done.

**ADMISSIBILITY NOT RAISED IN APPELLATE COURT FOR FIRST TIME.**—

Objection to the admissibility of evidence cannot be made for the first time in the appellate court.

(Syllabus by the court.)

APPEAL from District Court, Washington County.

Huston & Gray, for Appellant.

Depositions should be taken at the place named in the commission, and, this not appearing by the certificate of the commissioner or otherwise, they cannot be read. (Weeks' Depositions, sec. 192; *Rhoades v. Selin*, 4 Wash. C. C. 723, Fed. Cas. No. 11,740.) Evidence by depositions is in derogation of the common law, and, to entitle them to be received, the statutory provisions in relation to taking depositions must be strictly complied with. (Weeks' Depositions, sec. 328; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183; *Dye v. Bailey*, 2 Cal. 383; *Williams v. Chadbourne*, 6 Cal. 559; *McCann v. Beach*, 2 Cal. 25.)

Vineyard and Brumback & Lamb, for Respondents.

The court will not presume error; it must be made to affirmatively appear. (*People v. Best*, 39 Cal. 690; *Moore v. Massini*, 43 Cal. 389; *Clark v. Sawyer*, 48 Cal. 133.) It is unnecessary to find upon an immaterial issue. (*Fontaine v. Railroad Co.*, 54

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Cal. 654; *McCourtney v. Fortune*, 57 Cal. 619; *Lovell v. Frost*, 44 Cal. 474.)

BUCK, J.—This action was brought to set aside a certain pretended deed from James Landy to D. Heagerty, and to declare the same void, on the ground that it is a forged instrument, and for other relief. The complaint was filed on the twenty-third day of July, 1885, and the action tried by the court at the July term of said court, 1886. Decision was rendered in favor of the defendants, and decree entered accordingly. Motion for a new trial was made and denied, and the plaintiff appeals from the judgment and decree of the court, and from the order denying a new trial, and brings the same into this court on a statement of the case.

The specification of errors assigns the following errors of law:

1. In admitting in evidence the deposition of one Robert C. Burton; 2. In admitting the minutes of the evidence of D. Heagerty (one of the defendants), taken before a committing magistrate on a charge of larceny against said Heagerty, to be read in evidence; 3. That there is no finding of the court as to whether the deed from Landy to Heagerty alleged to have been forged was or was not made in La Grande, Oregon, on the night of January 8, 1884; 4. In finding that said deed was valid, said finding being contrary to the evidence; and 5. That the decision and judgment are not supported by the evidence.

The appellant argues that the said deposition of Robert C. Burton was inadmissible in evidence for the reasons: 1. That the deposition was not taken at the place designated in the commission. An inspection of the commission shows that it designates the residence of the commissioner at Butte, Montana, but does not direct that the deposition be taken at that place, or any particular place. 2. That it does not appear that the deposition of the witness was read to the witness, and corrected by him, as is provided by section 969 of our code. The appellant places this objection to the deposition upon the principle that evidence by depositions is in derogation of the common law, and the statutory provisions providing therefor must be strictly construed. In support of this principle he cites *Dye v. Bailey*, 2 Cal. 383; *McCann v. Beach*, 2 Cal. 25; *Williams v. Chadbourne*,

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6 Cal. 559; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183. These cases, except that in 10 Pac. were authorities under the early practice act of that state.

The fourth section of the Civil Code of California, adopted in 1885, provides that "the rule of the common law that statutes in derogation of the common law are to be strictly construed, has no application to this code. The code establishes the law respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects, and promote justice." This is also section 3 of the Code of Civil Procedure of Idaho territory. This provision of the code changes the rule in this as well as other questions of practice in our territory.

In *Williams v. Eldridge*, 1 Hill, 249, Cowen, J., says that "they will presume the commissioner discharged his duty by doing all those things, in the execution of the commission, which he is not bound to return specifically as done."

Section 965 of our code provides that the commissioner shall "certify the deposition to the court." It does not specify the contents of the certificate, and under the rule above cited in *Williams v. Eldridge*, and section 3 of our code, it will be presumed that the commissioner did all that he was required to do.

It is also objected that there is no certificate. There seems to have been a return by the commissioner, which was not objected to on the trial, and we think any objection thereto is waived, and that the deposition was properly admitted in evidence.

The second specification of error is that the court erred in admitting the minutes of the evidence of Mr. Heagerty at a preliminary examination on a charge of larceny. We find no objection to this evidence in the statement, and it is claimed none was made on the trial. It is too late to make the objection for the first time on appeal.

The third specification of error is that there is no finding as to whether the deed alleged to have been forged from Landy to Heagerty was executed and delivered on the eighth day of January, 1884, at La Grande, Oregon. The second finding of fact is that said Landy's signature to said deed is genuine. That seems to have been the real issue in the case, and we think the *locus in quo* immaterial, and a finding not required thereon.

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Points decided.

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The fourth and fifth alleged errors are that the finding that the said deed was valid is contrary to the evidence, and that the judgment and decision are not supported by the evidence. The evidence shows that Mr. Landy was the owner of one-half of the Black Maria mine, and had been for several years before the transactions set out in the complaint; that he was unable to develop the same, or to demonstrate its value, because of a lack of machinery; that Mr. Heagerty had the means to procure machinery; and that, under an indefinite arrangement with Mr. Landy, he shipped a quartz-mill into the country, and met Mr. Landy at La Grande, Oregon, where the deed in dispute is alleged to have been executed. These circumstances are such as might lead to some similar transaction to the arrangements set up in the answer. Mr. Burton directly states that Mr. Landy executed the deed, and Mr. Landy directly denies it. The deed, however, is produced, and several witnesses acquainted with Mr. Landy's signature declare it to be genuine. None are produced who deny its genuineness, and a comparison of handwriting indicates that the signature is genuine. In the trial court the witnesses were examined in person, and the court had an opportunity to judge of their credibility from their manner of testifying and appearance on the stand, which this court has not. We are unable to see that the findings of fact are not sustained by the evidence, and the judgment is affirmed.

Hays, C. J., and Broderick, J., concur.

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(February 14, 1887.)

PARKE ET AL. v. WARDNER ET AL.

[13 Pac. 172.]

**DEFECTIVE SUMMONS.**—Where a summons is irregular or defective, the remedy, if any, is by application to the trial court, to quash or set aside.

**WRONGFUL CONVERSION—DAMAGES—JUDGMENT BY DEFAULT.**—In an action for the wrongful sale of personal property, and the wrongful conversion of the proceeds thereof, it is error for the clerk to enter a final judgment, as upon default, but the plaintiff in such case should go into court and prove his damages.

(Syllabus by the court.)

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Opinion of the Court—Broderick, J.

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APPEAL from District Court, Shoshone County.

Albert Allen and W. W. Woods, for Appellants.

If a summons is defective, the court acquires no jurisdiction either of the persons of defendants served or of the subject matter of the action, and the entry of default by the clerk was without authority. (*Atchison etc. R. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Smith v. Aurich*, 6 Colo. 388; *People v. Green*, 52 Cal. 577; *Porter v. Hermann*, 8 Cal. 625.) Under the provisions of statutes identical in language with our own, we cite: *Bond v. Pacheco*, 30 Cal. 530; *Providence Tool Co. v. Prader*, 32 Cal. 636, 91 Am. Dec. 598; *Cram v. Hirschfelder*, 17 Cal. 582; *Kelly v. Ban Austin*, 17 Cal. 564; *Graydon v. Thomas*, 3 Or. 250; Freeman on Judgments, 2d ed., secs. 129, 532-542, inclusive.

BRODERICK, J.—This is an action for the recovery of the value of certain goods and chattels which are alleged to have been wrongfully converted and sold. The plaintiffs demanded judgment for \$900 and costs. Summons was issued and served on the defendants, but there was no appearance or answer. Default and final judgment was entered by the clerk, and from this judgment the defendants appeal, and assign as error: 1. The summons does not set forth the cause of action stated in the complaint in any manner, and the clerk had no jurisdiction to enter default; 2. The judgment entered by the clerk herein was entered without statutory authority and is void; 3. The court never had or acquired jurisdiction.

The first point is not well taken. The summons is irregular, but not void, and for irregularity the remedy, if any, was by application in due time to the court below for an order to quash or set it aside.

The second alleged error is that the judgment entered by the clerk was without statutory authority, and is void. The authority, if any exists, by which the clerk of the district court may, without an order of the court, enter judgment, is found in section 356 of the Code of Civil Procedure, which reads: "Judgment may be had if the defendant fail to answer the complaint, as follows: In an action arising upon contract for the recovery

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Opinion of the Court—Broderick, J.

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of money or damages only, if no answer has been filed by the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs against the defendant," etc.

The complaint alleges, in the first and second counts, that defendants were the agents of the plaintiffs to sell or dispose of certain machinery, and when disposed of defendants were to account to plaintiffs therefor; that defendants wrongfully converted said property to their own use, and disposed of the same as their property and wrongfully converted the proceeds, and failed and refused to account to plaintiffs. In the third count the complaint avers that the plaintiffs left with the defendants certain machinery to dispose of as agents for plaintiffs; that defendants wrongfully converted this property to their own use, broke and injured same; and that, by reason of such wrongful conversion and use, plaintiffs were damaged in the sum of \$200. We are of opinion that neither of these causes of action, as set forth in the complaint, falls within the statute which provides that, "in an action arising upon contract, for the recovery of money or damages only," a default and final judgment may be entered by the clerk. The plaintiffs in this case should not have applied to the clerk to enter judgment, but should have gone into court, and submitted their proofs upon the questions presented by the complaint.

The default is opened, judgment vacated and set aside, and the cause remanded to the court below for further proceedings.

Hays, C. J., and Buck, J., concurring.

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Argument for Appellants.

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(February 14, 1887.)

## TOULOUSE ET AL. v. BURKETT.

[13 Pac. 172.]

**PLEADING—PRACTICE—OBJECTION CANNOT BE RAISED IN SUPREME COURT FOR FIRST TIME.**—If an action is tried upon the theory that the answer denies the allegations of the complaint, the objection that certain allegations in the complaint are admitted through defective denials cannot be raised for the first time in the appellate court.

**ERROR NOT SHOWN—PRESUMPTION IN FAVOR OF TRIAL COURT.**—If the record on appeal does not affirmatively show error in the court below, the judgment will be affirmed, as every intendment is in favor of the regularity of the trial court.

(Syllabus by the court.)

## APPEAL from District Court, Alturas County.

A. F. Montandon, for Appellants.

Findings contrary to admission in the pleadings must be disregarded, nor can a defendant controvert a fact admitted by the pleadings. (*Burnett v. Stearns*, 33 Cal. 468; *Bradbury v. Cronise*, 46 Cal. 287; *Mill v. Den*, 54 Cal. 20; *Tracy v. Craig*, 55 Cal. 93; *Silvey v. Neary*, 59 Cal. 97, 98; *White v. Douglass*, 71 Cal. 115, 11 Pac. 860.) A refusal of a party to perform amounts to abandonment. (*Hicks v. Lovell*, 64 Cal. 14-21, 49 Am. Rep. 679, 27 Pac. 942.) Where parties wishing to apply one law, but mistakenly apply another, relief will be afforded, and the same rule will prevail as if it was a mistake of fact. (*Pitcher v. Hennesy*, 48 N. Y. 415; *Lanning v. Carpenter*, 48 N. Y. 408.) A specific denial to each allegation of a complaint is a separate denial, applicable only to the particular allegation controverted. (*San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453-473.) An allegation not denied is admitted, though the allegation is in the charging part. (*Thomas v. Austin*, 4 Barb. 265.) Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. (*Racouillat v. Rene*, 32 Cal. 450, 454; *Gay v. Winter*, 34 Cal. 153.)



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Opinion of the Court—Buck, J.

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Kingsbury & McGowan, for Respondent.

No authorities cited in their brief.

BUCK, J.—This action is brought to set aside an alleged contract, and to reform a deed, upon the ground that it was executed by mutual mistake. The plaintiff appeals from the judgment, and brings the cause into this court on a bill of exceptions.

The errors assigned and insisted upon are that certain findings of fact by the trial court are contrary to the evidence, in that they are contrary to the admissions in defendant's answer. There is no evidence in the transcript, and appellant rests the merits of his appeal entirely upon admissions by defendant in failing to deny certain allegations of the complaint. In each instance in which objection is made to the denials in the answer, there is, at least, an attempted denial. Had the objection been made in the trial court by motion or other appropriate remedy, or had objection to the introduction of evidence been made upon the ground that the allegations in the complaint were admitted by defective denials, the ruling of the court thereon might have been brought to the consideration of this court. There is, however, nothing in the record to indicate that these denials were not regarded sufficient to raise an issue upon the trial of the case. It is a rule of practice that, "if a cause is tried upon the theory that the answer denies the allegations of the complaint, the plaintiff will not be permitted to object to the sufficiency of the denials for the first time in the appellate court." (2 *Estee's Pleading and Practice*, 3d ed., 467; *White v. Railroad Co.*, 50 Cal. 417.)

It is the duty of the court to find the facts, upon the issues made, according to the evidence given at the trial, and the presumption of law is in favor of the regularity of the proceedings of the court trying the cause. (*Lowe v. Turner*, 1 Idaho, 107; *Goodman v. Milling Co.*, 1 Idaho, 131; *Hazard v. Cole*, 1 Idaho, 276.)

In the absence of anything in the record indicating that these denials were not accepted as sufficient when the cause was tried, we find no error, and the judgment is affirmed.

Hays, C. J., and Broderick, J., concurring.  
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Argument for Appellant.

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(February 17, 1887.)

## COUGHANOUR v. HOFFMAN'S ESTATE.

[13 Pac. 231.]

**HOMESTEAD—EXEMPTION.**—Under the homestead laws of this territory, page 627 of our Revised Laws, edition of 1874-75, the widow may select a homestead after the death of her husband under section 1 of said act, and have the same set apart, by the probate court, for the benefit of herself and children, under section 4 of said act.

**WIDOW HEAD OF FAMILY UNDER HOMESTEAD ACT.**—The widow is the head of a family in contemplation of the first section of said act, and the benefits of the act are secured to her as a wife surviving her husband by section 4 of said act.

(Syllabus by the court.)

## APPEAL from District Court, Boise County.

George Ainslie, for Appellant.

The widow could acquire no homestead interest in the property until an order of the probate court or judge was made setting it apart for her. It differs from the case of a homestead created during the existence of the community by a compliance with the provisions of the homestead act. (*Estate of Boland*, 43 Cal. 640-642 et seq.) The probate court does not acquire jurisdiction to set apart a homestead for the surviving wife, where no homestead had been selected before the death of the husband, unless a petition therefor is filed. (*Cameto v. Dupuy*, 47 Cal. 79.) The declaration of homestead must be filed during lifetime, and not by the survivor. (*Estate of James*, 23 Cal. 416 et seq.) The probate court, in setting apart, for the use of the family of the deceased husband or wife, property which had been dedicated as a homestead under the homestead act, does not change or transfer the title, nor does it adjudicate the question of title. (*Rich v. Tubbs*, 41 Cal. 34-36.) One claiming the benefit of the homestead law must establish a clear case within its provisions. (*Tilton v. Vignes*, 33 La. Ann. 240; *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92; *Lord v. Lord*, 65 Cal. 84, 3 Pac. 96.) The exemption of property from sale on execution is a personal right, which the debtor may waive or claim at his election. (*Borland v. O'Neal*, 22 Cal. 507.) The

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homestead rights of a widow and children are determined by the conditions existing at the time of the death of the husband and father, not by the conditions existing at the time of the settlement of the succession. (*Lessasuer's Succession*, 34 La. Ann. 1066.) The widow's homestead right must be determined by the law in force when the debts were contracted against which it is asserted. (*Bolling v. Jones*, 67 Ala. 508.) The fact that the probate court, after the death of the wife, set the property apart as a homestead for the benefit of the surviving husband and children, does not affect the question. (*Watson v. Creditors*, 58 Cal. 556-558.)

C. S. Kingsley, for Respondents.

Section 123 of the Probate Practice Act provides for the setting aside of a homestead, either under the general homestead law or under the fifth subdivision of section 126. It is obligatory on the probate court. (*Estate of Orr*, 29 Cal. 101; *Estate of Walley*, 11 Nev. 260; *Estate of Wixon*, 35 Cal. 320; *Estate of Ballentine*, 45 Cal. 696; *Sulzberger v. Sulzberger*, 50 Cal. 385; *Mawson v. Mawson*, 50 Cal. 539; *Estate of McCauley*, 50 Cal. 544; *Eproson v. Wheat*, 53 Cal. 715.) If the widow is not, strictly speaking, "wife," she is at least the "head of a family." (*Ellis v. White*, 47 Cal. 73; *Estate of Walley*, 11 Nev. 260; *Estate of Busse*, 35 Cal. 310.) That the tract included in the homestead was originally two farms or tracts, divided by imaginary lines, does not affect the question, so long as they are contiguous, and so connected as to constitute one body. (*McDonald v. Badger*, 23 Cal. 393, 83 Am. Dec. 123; *Clarke v. Shannon*, 1 Nev. 568.) It need not have been taken or selected before the death of the husband. (*Estate of Busse*, 35 Cal. 310.) But may be made at any time before sale on execution. (*Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397; *Estate of Walley*, 11 Nev. 260; *Estate of Boland*, 43 Cal. 640.) It may be taken for property which the husband acquired before marriage. (*Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Gee v. Moors*, 14 Cal. 472.)

BUCK, J.—Appeal from a decree of the district court, confirming an order of the probate court of Boise county, setting

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Opinion of the Court—Buck, J.

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aside three hundred and seventeen acres of land as a homestead, upon petition of Ella M. Hoffman, widow of Fred Hoffman, deceased, under section 4, page 629 of the Revised Laws of Idaho. The section reads as follows: "The homestead, and other property exempt from forced sale, of either husband or wife, may be set apart by the probate court for the benefit of the surviving husband or wife, and his or her legitimate children." Section 1 of the same act (Revised Laws, 627) provides that "the homestead, consisting of a quantity of land, together with the dwelling thereon, and its appurtenances, not exceeding in value the sum of \$5,000, to be selected by the husband and wife, or either of them, or the head of a family, shall not be subject to forced sale on execution," etc. The section further provides that said homestead shall be selected by a written declaration, and recorded as a conveyance affecting real estate, and after said recording the husband and wife shall be deemed to hold said premises as joint tenants.

It is argued by appellant that a homestead, set aside to the widow, must be limited to twenty acres, under section 126, chapter 5, of the probate act (page 262 of our Revised Laws). That section provides that, "if there is no law in force exempting property from execution, a homestead, consisting of a quantity not exceeding twenty acres," etc., "shall be set apart for the use of the widow and children, and shall not be subject to administration." In our territory there is an exemption law, and therefore said section 126 of chapter 5 is not applicable to the case at bar.

It is claimed by appellant that deceased, Hoffman, having neglected to claim his homestead while living, he had no real estate exempt from execution at the time of his death, and therefore there was no homestead exempt from forced sale at the time of his death which could be set apart to his widow and children. This construction seems too literal to be in harmony with the spirit of our homestead laws. Homestead and exemption laws are construed liberally, as a protection of the unfortunate. (Rorer on Judicial Sales, secs. 1354, 1355; *Woodward v. Murray*, 18 Johns. 400; *Conklin v. Foster*, 57 Ill. 104; *Kneetle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186.) It is admitted in this case that neither the deceased, Hoffman, nor his wife had made a selection of a homestead under the statute

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prior to his death; but that, after his death, and prior to the order of the probate court appealed from, the widow, Ella M. Hoffman, made the declaration, and had the same recorded as provided by law. It is claimed, however, by appellant that the widow is not a wife in contemplation of statute, nor is she the head of a family under the contemplation of the homestead law. It is admitted that the widow is the mother of three children, all of whom are living with her, and dependent upon her for support. We think that she is clearly the head of the family, and entitled to exercise her right to select a homestead at any time before the property is disposed of by forced sale or otherwise. (*Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397; *Estate of Walley*, 11 Nev. 260; Rorer on Judicial Sales, secs. 1358, 1359.) In the case at bar she did so after the death of her husband, and during the course of administration of his estate. We think she was entitled so to do.

It is contended, however, by appellant, that, admitting that the selection of a homestead was valid, under the first section of the homestead act, yet, being a widow, she is not a wife, and section 4 does not authorize the homestead to be set off to her as the head of the family by the probate court. We think this construction inconsistent with the spirit of homestead or exemption laws. The statute reads in terms that the homestead, etc., may be set apart for the benefit of the surviving husband or wife. Perhaps the meaning would have been better expressed by transposing the words so that it would read "for the benefit of the husband or wife surviving." But it cannot be presumed that the legislators intended to limit the benefits of this section to the husband, and deprive the widow of it, when she needed it most. Indeed, the construction contended for would deprive the husband surviving the wife of the homestead, as well as the wife surviving the husband, and the section would be without force or meaning. We deem it unnecessary to discuss the principles involved in this case at length, as we are informed that in the revision of our laws which will take effect on the 1st of June, 1887, important changes have been made in the sections considered in this case.

Judgment is affirmed.

Hays, C. J., and Broderick, J., concur.

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Opinion of the Court—Hays, C. J.

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(February 21, 1887.)

## GOLDSTEIN v. KRAUSE ET AL.

[13 Pac. 232.]

**PLEADINGS—SHAM ANSWER—TEST.**—An answer taking issue only on an immaterial issue of the complaint is frivolous, and may be stricken out on that ground. Falsity is the test of a sham answer, and where shown to be sham by this test may be stricken out. (Syllabus by the court.)

APPEAL from District Court, Shoshone County.

Charles W. O'Neil, for Appellants.

A sham answer is one which is good in form, but false in fact, such falsity being proven by the failure of the defendants to deny the truth of the matters set up in the affidavits in support of the motion to strike. (*Gostorfs v. Taafe*, 18 Cal. 385; *Fay v. Cobb*, 51 Cal. 313; *Arata v. Mining Co.*, 65 Cal. 340, 4 Pac. 195.) The answer was pleaded in good faith, and, if sufficient in law, it should have been demurred to. If true, it was a good defense. (Waples on Attachments, p. 208, note 2; citing *Burton v. Wynne*, 55 Ga. 651; *Clough v. Buck*, 6 Neb. 343; 2 Wade on Attachments, secs. 460, 462; *Bills v. Bank*, 89 N. Y. 349.)

W. W. Woods, for Respondent.

If the plea is false, the striking out is not an invasion of the trial by jury. (*Coykendall v. Robinson*, 39 N. J. L. 98.) Fraud, as a defense, must be specially pleaded. (*Churchill v. Anderson*, 56 Cal. 55; *McKiernan v. Lenzen*, 56 Cal. 61; *McCreary v. Marston*, 56 Cal. 403; *Brodrub v. Brodrub*, 56 Cal. 566; *Hayward v. Rogers*, 62 Cal. 349.

**HAYS, C. J.**—This action was brought upon a promissory note. The complaint alleges the making and delivering of the note to one Henry Bernstine, by the defendants, who were copartners, under the firm name of Krause & Boehm, and that the same became due on the twenty-third day of August, 1884, and had not been paid; that prior to the maturity of

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Opinion of the Court—Hays, C. J.

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the note Henry Bernstine duly indorsed and delivered the note to this plaintiff, who has ever since been the owner and holder of the note. Defendants, Krause & Boehm, answering, admit the partnership; the making and delivering of the note; that the same became due and owing August 23, 1884, and that the same is not paid; but deny that, prior to August 20, 1884, Henry Bernstine indorsed and delivered the note to this plaintiff, and that the plaintiff is the owner and holder of the same. And for further answer allege that, on the thirteenth day of August, 1885, Corbit and Mackay sued Henry Bernstine, and garnisheed these defendants, and thereby attached the money due upon said note. Corbit and Mackay intervened, and set out, in their complaint, as interveners, in substance, what had been alleged in the answer. Plaintiff demurred to this complaint, and the demurrer was sustained. Upon motion of plaintiff, the answer was stricken out as sham and irrelevant, and judgment was entered in favor of plaintiff, from which an appeal is brought.

Section 250 of our Code of Civil Procedure provides: "Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out upon such terms as the court may, in its discretion, impose." Under this section, a court may strike out a whole answer as irrelevant or as sham. By reference to the pleadings, it will be observed that the defendants admit that the note became due August 23d; but they deny that it was indorsed and delivered to plaintiff prior to August 20th. This is equivalent to an admission that it was indorsed and delivered prior to its maturity. But defendants deny that plaintiff is the owner and holder of the note. This is the only question raised by the answer.

A frivolous answer is one which denies no material averment in the complaint, and which, if admitted to be true, does not constitute any defense to the plaintiff's cause of action. (2 Wait's Practice, 492, and cases there cited.) An answer taking issue only on an immaterial averment in the complaint is frivolous. (*Fairchild v. Railroad Co.*, 15 N. Y. 337, 69 Am. Dec. 606.) In *Wedderspoon v. Rogers*, 32 Cal. 569, the court says: "The averment that the plaintiff was the owner of the note is not an averment of an issuable fact. It is but the

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Argument for Respondent.

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avermert of a conclusion of law, which follows from the other facts averred. It was immaterial, and might have been omitted. The conclusion of law necessarily followed from the other facts stated." Tested by these rules, this answer was frivolous. Falsity is the principal element of a sham answer. (2 Wait's Practice, 488, and cases cited.)

The plaintiff properly proceeded upon proof furnished the court below, in accordance with the practice, to thus test the answer. The court there found the answer to be sham—we think rightfully, unless it may be said it was so irrelevant that it could not be sham. But it was properly stricken out.

It is unnecessary to go into a discussion of the propriety of sustaining the demurrer. The intervening complaint was insufficient, and the demurrer was properly sustained.

Judgment affirmed.

Buck and Broderick, JJ., concurring.

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(February 21, 1887.)

BERRY v. ALTURAS COUNTY.

[13 Pac. 233.]

**EXCEPTION TO ORDER SUSTAINING DEMURRER.**—An exception deemed to have been taken to the order sustaining a demurrer should have been settled in a bill of exceptions and brought to this court. When it is not done the court will not consider it.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County.

J. H. Harris, for Appellant.

No authorities cited on point decided.

Richard Z. Johnson, Attorney General, for Respondent.

That the exceptions which, by section 403 of the Code of Civil Procedure, the adverse party is deemed to have taken, "cannot be considered on appeal without being incorporated



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Opinion of the Court—Hays, C. J.

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into a bill of exceptions, and thus made a part of the judgment-roll." (*Guthrie v. Phelan*, ante, p. 95, 6 Pac. 107, 109; *Guthrie v. Fisher*, ante, p. 111, 6 Pac. 111; *Purdum v. Taylor*, ante, p. 167, 9 Pac. 607; *Fox v. West*, 1 Idaho, 782.)

HAYS, C. J.—The plaintiff commenced his action in the district court. Defendant demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. Plaintiff not amending, a judgment was entered in favor of defendant, from which judgment plaintiff appealed. No bill of exceptions was settled, and none is brought to this court. We had supposed the practice to be settled in this territory that the exceptions which, by section 403 of the Code of Civil Procedure, the adverse party is deemed to have taken, cannot be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the judgment-roll. (*Fox v. West*, 1 Idaho, 782; *Guthrie v. Phelan*, ante, p. 95, 6 Pac. 107; *Guthrie v. Fisher*, ante, p. 111, 6 Pac. 111; *Purdum v. Taylor*, ante, p. 167, 9 Pac. 607.)

Many questions of practice have been settled here. They should be observed by the profession, and adhered to by the courts, unless changed by legislative enactment. Prudence would seem to dictate the necessity of a careful observance of them, as the danger of looking too far from home for rules of practice must be apparent to the thoughtful practitioner.

The record failing to bring before us the points discussed, and no error being apparent, the judgment must be affirmed.

Buck and Broderick, JJ., concurring.

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Opinion of the Court—Buck, J.

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(February 21, 1887.)

## PEOPLE v. ARMSTRONG.

[13 Pac. 342.]

**CRIMINAL PRACTICE—CHALLENGE TO PANEL.**—The intentional omission of the sheriff to summon a juror duly drawn is a good cause of challenge to the panel of the trial jury. (Criminal Practice Act, sec. 322.)

**EXCEPTION TO CHALLENGE—EFFECT.**—An exception to the challenge to the panel admits the facts stated therein. Such exception in our criminal practice has the same relation to the denial of the challenge as a demurrer to a complaint has to the denials in the answer in our civil practice.

(Syllabus by the court.)

No briefs filed in this case.

BUCK, J.—The defendant was indicted at the October term, 1886, for the crime of murder in the first degree, and charged therein with the killing of one Paul Klubert on the twenty-second day of August, 1886. When the cause was called for trial, the defendant, by his attorneys, Kingsbury & McGowan, interposed a challenge of the panel of the trial jury, and specified, as the facts constituting the grounds of said challenge, "that the sheriff had purposely omitted to summon one L. H. McIrving, a trial juror drawn to serve at said term of court, and whose name was on the list of jurors given to the sheriff to be summoned as said juror." To such challenge, N. M. Ruick, the district attorney for Alturas county, excepted, and the same having been submitted to the court was overruled, to which ruling the attorneys for the defendant excepted, and the cause is brought into this court on a bill of exceptions. The record contains much other matter; but, as the conclusion of the court upon said assignment of error is decisive of the case, it will not be necessary to consider the other specifications of error.

The appeal having come into this court, the attorney general stated that, upon examination of the record, he was of the opinion that the said assignment of error was well taken, and moved that the cause be placed upon the calendar, the judgment be reversed, and the case remanded for a new trial. By consent

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Opinion of the Court—Buck, J.

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of the attorneys for the defendant the said motion was submitted without argument.

Our Criminal Practice Act (Rev. Laws 1874-75, p. 409), provides as follows: "Sec. 324. If the sufficiency of the facts alleged as a ground of challenge be denied, the adverse party may except to the challenge. Sec. 325. Upon the exception, the court shall proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true. Sec. 326. If, on the exception, the court deem the challenge sufficient, it may, if justice require it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception be allowed, the court may in like manner permit the amendment of the challenge. Sec. 327. If the challenge be denied, the . . . court shall proceed to try the question of fact." Section 322 specifies the intentional omission of the sheriff to summon one or more jurors drawn as a good cause of challenge to the panel.

An exception to a challenge in our criminal practice is practically a demurrer thereto, and admits the facts stated therein. An exception to a challenge and a denial of it has sometimes inadvertently been confounded as meaning the same thing. This seems to have been so regarded by the district attorney in the case at bar. An inspection of the statute, however, indicates that they bear the same relation to each other in our criminal practice as the demurrer to the complaint and denials in the answer do in our civil practice. The district attorney having failed to deny the challenge, the facts stated therein were admitted. The intentional omission of the sheriff to summon the juror McIrving was thereby admitted; and, such omission being designated as a ground of challenge by section 322 of our Criminal Practice Act, it was a good cause of challenge to the panel, and the challenge should have been sustained. The motion is granted, judgment reversed, and the cause remanded for a new trial.

HAys, C. J., and Broderick, J., concur.

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Argument for Respondent.

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(February 21, 1887.)

## HOPKINS v. UTAH NORTHERN RAILWAY COMPANY.

[13 Pac. 343.]

**CONTRIBUTORY NEGLIGENCE.**—Where suit is brought against a railway company to recover damages for injured property, by reason of the negligence of the agent or servants of the company, and defendant relies on such contributory negligence of the plaintiff or his servants as to prevent a recovery, this is a defense to be established by the defendant.

**RULE OF EVIDENCE.**—It is a general rule that the defendant should not open the defense by cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court.

**INCOMPLETE RECORD—PRESUMPTIONS.**—Where a refusal to give instructions requested by a party is assigned as error, this court will look into the entire charge to determine whether such refusal was prejudicial, and where the record shows that a charge was given which is not brought here for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

P. L. Williams and Homer Stull, for Appellant.

It is not necessary to plead contributory negligence in order to prove it, and especially is this true where the plaintiff has alleged that he is without fault, and this is denied by the answer. (*Pomeroy's Remedies*, secs. 642, 670-575, inclusive; *Railway Co. v. Shacklet*, 12 Am. & Eng. R. R. Cas. 166; *Hawes v. Railway Co.*, 64 Iowa, 315, 20 N. W. 717.)

Smith &amp; Wright, for Respondent.

New matter is that which, under the rule of evidence, the defendant must affirmatively establish. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter. All new matter of defense must be stated in the answer. (*Railway Co. v. Crawford*, 1 Idaho, 770; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Glazer v. Clift*, 10 Cal. 304; *Coles v. Soulsby*, 21 Cal. 50.)

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Opinion of the Court—Broderick, J.

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BRODERICK, J.—This action is to recover damages for killing a team of horses, and the destruction of a wagon and harness of the plaintiff, which is alleged to have been caused by the negligence of the defendant company, about the first day of November, 1885, near Blackfoot, in this territory. The complaint alleges, in substance, that defendant was a corporation, duly incorporated, etc.; that plaintiff was the owner of a team and wagon worth \$450; that, at a time and place named, the team and wagon were negligently run against and over by defendant's locomotive, the team killed, and wagon and harness damaged; that the accident happened through no fault of plaintiff, but resulted from the carelessness and negligence of the agents and servants of the defendant; and that by reason of such negligence the plaintiff was damaged in the sum of \$350. The defendant answered, denying specifically each allegation of the complaint except that defendant was a corporation. In May, 1886, the case was tried before the court with a jury, which resulted in a verdict and judgment in favor of the plaintiff for \$225 and costs. The defendant moved for a new trial. Motion overruled by the court, and from this order and the judgment the defendant appeals, and assigns as error: 1. That the evidence is insufficient to justify the verdict of the jury, in this: That it does not show that the defendant was negligent in the premises, or that any negligence on its part caused the injury complained of, and constituting the cause of action herein; and in that it does show that the plaintiff's servant, Charles Chestine, who was driving the team, was negligent in not looking along the track to discover the approach of an engine as he neared the crossing, and that his negligence in that connection caused, or contributed to cause, the injury complained of; 2. Errors in law occurring at the trial, and excepted to by defendant, in excluding certain evidence sought to be introduced by cross-examination of plaintiff's witnesses; 3. That the court erred in refusing to give certain instructions to the jury requested by defendant's counsel.

The evidence is undisputed that the team and the train were coming from the north; that the train was running at rapid speed; that the highway upon which the team was moving, for some distance above the crossing, runs nearly parallel with de-

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Opinion of the Court—Broderick, J.

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fendant's road; that about eighty rods above the crossing was a whistling-post; that the accident happened at the crossing, and at the time stated in the complaint. The rules of defendant in force at the time of the alleged accident were identified and received in evidence at the trial, but do not appear in the record. The case seems to have been tried, however, on the theory that the rules required the whistle sounded when a train was nearing a crossing, and we think there is sufficient proof in the record from which we may infer, for the purposes of this appeal, that this was the requirement of the rule. Each party introduced evidence before the court and jury as to whether or not the whistle was sounded, or other signal given, before the engine reached the crossing, and on this question there seems to have been a substantial conflict in the testimony, all of which was submitted to the jury, and the question is settled by the verdict.

• But it is contended that, even though the defendant was negligent, that the plaintiff, by the carelessness of his servant who was at the time in charge of the team, contributed to the result and injury, and that, therefore, the defendant is not liable. In this case the burden was on the plaintiff to prove, in the first instance, that his property was injured and destroyed, for which he seeks redress, and that such injury was done by the locomotive of the defendant at or about the time and place charged in the complaint, and that such injury was the result of negligence of the agents and servants of the defendant. These facts proven, with the amount of damages sustained, made a *prima facie* case for the plaintiff. Then the burden shifted to, and was cast on, the defendant to overcome the case made by the plaintiff, by showing that the agents and servants of defendant were on this occasion exercising due care and caution; or, if it relied on such contributory negligence of the plaintiff or his agent as to prevent a recovery of judgment by plaintiff, that was a defense to be proven and established by defendant. (*Railway Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Horst*, 93 U. S. 291.) We are aware that there has been a contrariety of opinion on this question, but we are entirely satisfied with the rule as settled by the above-cited authorities.

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Opinion of the Court—Broderick, J.

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We see no error in the ruling of the trial court in excluding the evidence sought to be adduced by the defendant by cross-examination of plaintiff's witnesses as tending to show contributory negligence on the part of plaintiff's servant. It is a general rule that the defendant should not open his case by a cross-examination of plaintiff's witnesses; but the application of this rule must necessarily rest largely in the sound discretion of the trial court. The record shows, however, that the defendant, to make out its defense, was permitted to introduce all evidence offered as to the negligence of plaintiff's servant, and this question was also submitted to the jury. In this state of the case it is unnecessary to determine here whether, under our practice, the defendant should have pleaded contributory negligence as a predicate for the proof on this point or not.

The remaining question is as to the instructions requested by defendant's counsel, and refused by the court. Counsel contend that the evidence shows that the accident happened in a level, open country, where there was no obstruction to prevent the driver from seeing the approaching engine in time to have stopped or turned aside, and thus have avoided the collision; and that the instructions refused were proper, and should have been given to direct the attention of the jury to these facts. It is doubtless the duty of a person approaching a railroad crossing to listen and look if he is in a position where looking will avail him; and if, under all the circumstances, he has reason to suspect or apprehend danger, and does not use his senses, but heedlessly goes on, and is injured in person or property, he alone is responsible for the consequences of such negligence. But in this case the teamster was driving in advance of the approaching train, with his back toward it, and he testifies, in substance, that he heard no signal of any kind, and saw nothing to indicate danger until within a short distance of the crossing, and where the highway gradually turned toward the crossing, and that then and there the horses became affrighted, and commenced jumping and plunging toward the crossing; that he was wholly unable to stop or manage them; that he finally sprang out of the wagon in time to save himself harmless; that the collision took place; that the horses were killed, and

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Opinion of the Court—Broderick, J.

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the wagon and harness destroyed. There is other evidence which corroborates this testimony.

The trial court is required to give such instructions as are applicable to the issues and facts of each case, but is not required to state propositions of law, however sound they may be, which are not applicable, and will not aid the jury in reaching a correct conclusion. (*Railroad Co. v. Horst*, 93 U. S. 291; *United States v. Camp*, ante, p. 231, 10 Pac. 226.)

The record shows that an instruction defining negligence, etc., was given, which nowhere appears in the transcript. It has been held by this court that, in determining whether an instruction given was prejudicial, the entire charge should be looked into; and if the charge, as a whole, fairly presented the case to the jury, that the verdict would not be disturbed. (*People v. Bernard*, ante, p. 193, 10 Pac. 30.) The same rule will apply where instructions are refused. The reason for the rule is apparent.

We are here asked to reverse a judgment because certain instructions calling the attention of the jury to the alleged negligence of the plaintiff were refused, and it appears from the record that an instruction was given by the court, of its own motion, on this question; but the instruction, as given, is not brought here for our examination. Every intendment is in favor of the judgment, and the regularity of the proceedings; and the presumption is, until the contrary appears, that the court gave the instructions necessary and proper, under the facts of the case, to assist the jury in arriving at a just verdict. This presumption cannot be overthrown by a partial view of the instructions given. Those not given may have been refused for the reason that they had been substantially given. If so, the court was not bound to repeat them.

No error appearing, the judgment is affirmed.

Hays, C. J., and Buck, J., concurring.



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Argument for Respondents.

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(February 21, 1887.)

## BOWMAN ET AL. v. AYERS.

[13 Pac. 346.]

**FINDINGS THAT DON'T FIND.**—Where the findings of fact are not responsive to the material issues, and are so uncertain that they would not warrant a judgment thereon, the case should be reversed. (Syllabus by the court.)

APPEAL from District Court, Ada County.

Brumback &amp; Lamb, for Appellant.

The rule is that full findings are required upon every material issue without any request therefor, and without any exceptions on account of defects. And if any material issue is left unfound, it is ground for reversal of the judgment. (*Knight v. Roche*, 56 Cal. 17; *Brady v. Bartlett*, 56 Cal. 364; *Bilings v. Everett*, 52 Cal. 661; *Cummings v. Peters*, 56 Cal. 597; *Everson v. Mayhew*, 57 Cal. 144; *Packard v. Johnson*, 57 Cal. 379; *Speegle v. Leese*, 51 Cal. 415; *Harris v. Burns*, 51 Cal. 367; *N. P. R. R. Co. v. Reynolds*, 50 Cal. 90; *Dowd v. Clarke*, 51 Cal. 263; *Kinsey v. Green*, 51 Cal. 379; *Speegle v. Leese*, 51 Cal. 415; *Harris v. Burns*, 51 Cal. 528; *People v. Forbes*, 51 Cal. 628; *Carson v. Thews*, ante, p. 176, 9 Pac. 605.) A judgment based upon findings, which does not determine all such issues, is a decision against law. (*Knight v. Roche*, 56 Cal. 17; *Brady v. Bartlett*, 56 Cal. 364; *Bilings v. Everett*, 52 Cal. 661.)

Huston &amp; Gray, for Respondents.

When the statement does not purport to contain all the evidence, the appellate court will not consider the objection that the findings are not sustained by the evidence. (*Moore v. Tice*, 22 Cal. 513; *State v. Parsons*, 7 Nev. 57; *McLeod v. Lee*, 17 Nev. 104, 28 Pac. 124.) The judgment will not be disturbed unless the appellant shows that the facts found are inconsistent with the judgment. (*Mathews v. Kinsell*, 41 Cal. 512; *Hutchinson v. Ryan*, 11 Cal. 142.) A new trial for failure to find on a particular material issue may be denied if the finding on  
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such issue could not have changed the result. (*Gates v. McLean*, 70 Cal. 42, 11 Pac. 489; *Johnson v. Perry*, 53 Cal. 351; *Robinson v. Placerville etc. R. R.*, 65 Cal. 263, 3 Pac. 878.) When material facts are not found, it will be presumed on appeal that they were consistent with the judgment. (*Tweeksbury v. Magroff*, 33 Cal. 237; *Sharp v. Goodwin*, 51 Cal. 219; *San Francisco v. Eaton*, 46 Cal. 100; *Howard v. Throckmorton*, 48 Cal. 482; *Langworthy v. Coleman*, 18 Nev. 440, 5 Pac. 65; *Terry v. Berry*, 13 Nev. 514.)

HAYS, C. J.—This case, tried before the court without a jury, was brought to restrain the defendant from interfering with plaintiffs' water ditch, and for damages for injury to the same. The defendant claims an interest in said ditch. The title to, capacity of and cost of constructing the ditch were all in issue. There was also an issue as to the allegation that the defendant had obstructed the ditch, cut down its banks and flumes, and caused the waters thereof to run to waste. It was also alleged that defendant was committing waste of the waters of said ditch; that he threatened to continue the same, and would, unless restrained by injunction, damage and injure the ditch, which was plaintiffs' property. All of which defendant denied.

The court found that plaintiffs and defendant had each an interest in the ditch, but failed to find the capacity of the ditch, or its cost, or the interest specifically that each party had therein. This became necessary in order to determine whether or not the defendant had taken more water from the ditch than he was entitled to. If the ditch is as large as alleged in the complaint, it must have a carrying capacity of about two thousand inches of water. It is only claimed that defendant drew therefrom seventy-five inches; yet, from anything appearing in the findings, the defendant's interest may have been much greater than the plaintiffs'. How, then, are we to draw our conclusions of law? How can we determine the rights of the parties without these findings? Although there is an allegation of waste, and that defendant threatens to continue the same, and an issue upon this allegation, the court fails to find upon this issue, yet grants an injunction.

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Points decided.

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It is found in the sixth finding of fact that "in 1883 defendant constructed a ditch of his own, bringing water upon his land, and using a portion of plaintiffs' ditch upon or through defendant's land. The portion of the plaintiffs' ditch thus used was the part constructed in 1874, and adopted by the new ditch"; yet the court had before found that this ditch, which was constructed in 1874, was partly owned by the defendant. If the defendant was a joint owner in the old ditch, and the new ditch adopted this old ditch, and enlarged the same, the defendant would still have his interest in the ditch. It might be said, in a sense, that the ditches became commingled by the act of the plaintiffs; but this, certainly, would not divest defendant of his property therein. The conclusions of law and judgment were not warranted by the findings. If the court is correct, in finding 6, we are unable to see why the water which defendant, by his industry and enterprise, has brought upon his own land may not be used by him for any useful purposes, as he pleases.

The granting of an injunction restraining the defendant from using this water, except upon his own land, we think was error; the findings also being insufficient.

The judgment is reversed. Case remanded for a new trial.

Buck, J., concurring.

Broderick, J., expressing no opinion.

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(February 23, 1887.)

LALANDE ET AL v. McDONALD ET AL.

[13 Pac. 347.]

**NONSUIT—A FINAL JUDGMENT.**—A judgment of nonsuit is a final judgment within the meaning of our code, from which an appeal will lie.

**ACTION TO RECOVER REAL ESTATE—SECTION 2326 OF THE REVISED STATUTES OF THE UNITED STATES CONSTRUED.**—Where an action to recover specific real property is brought pursuant to section 2326 of the Revised Statutes of the United States, and there is no evidence for the consideration of the jury, a nonsuit may be granted. (Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.

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Argument for Appellants.

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A. E. Mayhew, W. B. Heyburn and W. W. Woods, for Appellants.

When a party enters upon land with no higher evidence of title than that which the law presumes from his possession, and distinctly marks out the extent and boundaries of his claim, his actual possession of a part within these boundaries gives him constructive possession of the whole. (2 Estee's Pleading and Practice, sec. 2172; *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599, and note.) Mining ground acquired by entry, under a claim for mining purposes, the bounds being distinctly defined, accompanied by actual occupancy of a part of the tract, is sufficient possession to maintain ejectment for the entire claim, although the acts of appropriation were not according to any mining rule. (2 Estee's Pleading and Practice, sec. 2257; *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 198.) Work done outside, in immediate proximity to the claim, is a sufficient possession. (2 Estee's Pleading and Practice, sec. 2257; *McGarrity v. Byington*, 12 Cal. 426; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.) If the possession is constructive, the extent of the claim or boundaries should be in some manner indicated or defined. (*Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599, and note; *Garrison v. Sampson*, 15 Cal. 93; *Borel v. Rollins*, 30 Cal. 408; *Huey v. Smith*, 3 Pa. St. 353; *Ellicott v. Pearl*, 10 Pet. 412.) Plaintiff in ejectment need not, in his complaint or in the proofs in support thereof, negative the allegations of defendant's answer, or disprove his title. The defendant must show his right affirmatively on his defense. (*Mining Co. v. Marsano*, 10 Nev. 379; *Golden Fleece etc. Min. Co. v. Cable Consolidated etc. Min. Co.*, 12 Nev. 320.) The entries of the defendants for the purpose of making survey for a patent or for planting the post were in themselves sufficient acts of ouster to maintain ejectment. (*Sears v. Taylor*, 5 Morr. Min. Rep. 318.) When neither party establishes title to the ground in controversy, judgment cannot be for either party, and suit must be dismissed. (*Mining Co. v. Brown*, 21 Fed. 167; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301.)

F. Ganahl, G. W. Stapleton and Albert Allen, for Respondents.

## Opinion of the Court—Hays, C. J.

No appeal lies\* from a judgment of nonsuit. (Civ. Code, secs. 354, 355; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189.) Such judgment is not on merits, and is not final. (*Gates v. McLean* (Cal.), 9 Pac. 938; *Clapp v. Thomas*, 5 Allen, 158; *Merritt v. Campbell*, 47 Cal. 545.) The answer of defendants denies the ouster of plaintiff, and therefore if plaintiff failed to prove such ouster, a nonsuit was proper. (*Association v. Willard*, 48 Cal. 614; *Miller v. Chandler*, 59 Cal. 540; *Shaeffer v. Matzen*, 59 Cal. 625; *Pope v. Dalton*, 31 Cal. 218; *Brown v. Brackett*, 45 Cal. 167.) Possession of a mining claim depends upon location thereof, and not location from possession. (*Belk v. Meagher*, 104 U. S. 287, 288; *Hauswirth v. Butcher*, 4 Mont. 307, 1 Pac. 714; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 759.) A defendant in ejectment who claims title to a large tract of land, including a smaller tract, for which plaintiff sues, and to which he shows title, cannot establish an adverse possession of the land of plaintiff by proving actual possession of a portion of a larger tract not extending to any of the land claimed by the plaintiff. (*Kimball v. Stormer*, 65 Cal. 116, 3 Pac. 408.) One in actual possession of real estate cannot maintain ejectment against a person not in possession. (*Carmichael v. Argard*, 52 Wis. 508, 9 N. W. 470.)

HAYS, C. J.—This action was commenced pursuant to the provisions of section 2326 of the Revised Statutes of the United States and the act of March 3, 1881, amendatory thereof, to recover the possession of specific real property. The plaintiffs allege in the complaint, among other things: "1. That they were citizens of the United States," which was admitted by the defendants. "2. That the plaintiffs now are, and ever since the sixteenth day of August, 1884, have been, through their grantors and predecessors in interest, the owners and entitled to the possession of that certain tract or parcel of mining ground known and called the 'Lalande claim,' and [describing the same] containing an area of thirteen and eighteen hundredths acres." This the defendants deny. "3. That on the sixth day of November, 1875, the said Scott McDonald and George P. Cater have made an application in the United States land office at Lewiston, Idaho, for a United States patent for

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Opinion of the Court—Hays, C. J.

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a certain mining claim called the 'Poorman lode and mining claim,' and have caused a survey of the same to be made, upon which said application for a patent is based, and which said survey overlaps a portion of the land above described as belonging to the plaintiffs herein, and which portion, so covered by said survey and application for patent, is described by metes and bounds as follows, to wit [the premises are here described, containing an area of six and forty one-hundredths acres of land]." The defendants admit the making of the application for patent for the mining claim called the "Poorman lode and mining claim," and the survey thereof, and that it includes the aforesaid land described in subdivision 3 of the complaint, but deny that the same, or any part thereof, belongs to the plaintiffs, or either of them. "4. That on the sixth day of November, 1885, the said Scott McDonald and George P. Cater, by the order of the register of the land office, caused notice of their said application to be published, notifying all persons claiming adversely any portion of the mining ground covered by the Poorman lode mining claim, as surveyed, to file their adverse claim," etc.; that the plaintiffs filed their adverse claim to the tract of mining ground hereinbefore described; that said claim was duly allowed; and this action is brought in support of this claim. This, not being denied by the answer, stands admitted. "5. That, while the plaintiffs were such owners of the aforesaid demanded premises, seised, possessed, and entitled to the possession of the same, the said defendants afterward, to wit, on or about the sixth day of November, 1885, and before the commencement of this suit, and without right or title, entered into possession of the said hereinbefore described tract of mineral land, mining claim, and location, the demanded premises, and ousted and ejected plaintiffs therefrom, and ever since said day and now, unlawfully withhold possession thereof from the plaintiffs, to their damage," etc. This the defendants deny.

The case being brought to hearing, a jury was called to try the issue. Various questions propounded by plaintiffs were excluded by the court, which ruling is now assigned as error. When the plaintiffs rested, upon motion of defendants the court ordered a nonsuit, and judgment of nonsuit and for costs was duly entered against the appellants; from which an appeal is

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Opinion of the Court—Hays, C. J.

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brought to this court. The respondents ask to have the appeal dismissed, on the ground that no appeal lies from a judgment of nonsuit.

Section 1869 of the Revised Statutes of the United States provides for the appellate jurisdiction of this court pursuant to such statute. Section 642 of our Code of Civil Procedure was enacted, which provides that "an appeal may be taken to the supreme court from a district court (1) from a final judgment in any action or special proceeding." The term "final judgment" has been variously defined. One definition is: "A judgment which puts an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for." (3 Blackstone's Commentaries, 398.) Again, it has been defined to be "a judgment which determines a particular cause, and terminates all litigation on the same right." (1 Kent's Commentaries, 316.) A third definition is given to be "a judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon." (*Snell v. Manufacturing Co.*, 24 Pick. 300; *Foster v. Neilson*, 2 Pet. 294; *Forgay v. Conrad*, 6 How. 201.)

In what sense, then, did the legislature use this term? By the common law in England a writ of error would lie from a judgment of nonsuit in the *nisi prius* courts to the king's bench, where costs were taxed in favor of defendant, and judgment entered thereon against the plaintiff. (3 Bacon's Abridgment, 325.) In this country the general rule seems to be that, in determining the question whether or not a judgment is final, within the meaning of the various statutes in relation to appeals, matters of form are to be disregarded, and matters of substance alone considered, and that the judgment is "final" if it disposes of the action or proceeding in which it was made, so far as the court which made it is concerned, without reference to the question whether the claims of the parties may not be litigated in some other action or proceeding. (*Weston v. City of Charleston*, 2 Pet. 449; *Yates v. People*, 6 Johns. 339; *Clason v. Sholwell*, 12 Johns. 31; *Belt v. Davis*, 1 Cal. 135.) With this rule before them, our code was adopted. True, under a statute similar to our own the supreme court of Montana seems to hold that an appeal would not lie from a judgment of non-

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Opinion of the Court—Hays, C. J.

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suit. (*Kleinschmidt v. McAndrews*, 4 Mont. 8, 5 Pac. 281.) But the case, being appealed, was considered by the supreme court of the United States, and the decision of the lower courts was reversed, thus disposing of that case and this question. (117 U. S. 282, 6 Sup. Ct. Rep. 761.) We must therefore conclude that the legislature intended by this enactment to allow appeals from all judgments which finally determine the particular suit without reference to the question whether or not it determines the final rights of the parties to the subject matter of litigation. A judgment of nonsuit being a final judgment within the meaning of our code, the motion to dismiss the appeal must be denied.

It will be observed by the pleadings heretofore referred to that the claims of appellants and respondents overlap each other to the extent of six and forty one-hundredths acres; that each party has grounds outside of the area in dispute. Upon the trial of the cause various questions were propounded by the plaintiffs tending to show work done upon the Poorman grounds by defendants, but outside of the area in dispute, for the alleged purpose of establishing possession in the defendants, and thus tending to prove ouster of plaintiffs. The court, under objection, excluded such testimony unless the plaintiffs first showed that the defendants have made or attempted to make a legal location of the entire claim. As a general rule, evidence should be competent in the order in which it is offered; yet from necessity it must be left to the discretion of the court which tries the case whether evidence will be admitted out of its proper order or not, and, except in cases of manifest abuse of discretion, the supreme court will not interfere with the ruling of the court below in that respect. A party claiming mining lands through possession alone only holds so much as he is in actual possession of, while if he seeks to hold through location, he must show more than mere possession; he must show a valid location upon which such possession is based. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the act of Congress and the local laws and regulations. (*Belk v. Meagher*, 104 U. S. 279.) If a proper location had been shown, and possession under it to a part of the claim,



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this might have been proper evidence to go to the jury, as tending to prove the issue. True, the plaintiffs might perhaps have been able to bring evidence later, tending to show that the defendants held the Poorman claim through location, but the court below gave them notice that they must introduce such testimony in advance of that which it rejected, and intimated if they did so it would then be competent. This the plaintiffs refused to do, and we think the testimony was rightly rejected; for, standing alone, it did not tend to prove the issue, and it was not competent in the order offered.

The judgment shows the motion for nonsuit to have been based upon the following grounds: "1. Upon the ground that the plaintiffs have failed to prove that the defendants, or either of them, at the time of the commencement of this action, or at any time since, have been or now are in the possession of the premises in controversy herein, or any part thereof; 2. That the plaintiffs have failed to prove that defendants, or either of them, at the time of the commencement of this action, or at any other time, or at all, have withheld the possession of the ground in controversy, or any part thereof, from the plaintiffs; 3. That the plaintiffs have shown by their evidence that the plaintiffs were at the time of the commencement of this action, and ever since have been and now are, in possession of the premises in controversy herein; 4. That the plaintiffs have failed to show that the location of the Lalande claim was made upon vacant and unoccupied public land." The record fails to show upon which ground the nonsuit was granted. Applying the rules, then, that the party alleging error must make it affirmatively appear, and that the presumptions are in favor of the correctness of the rulings and judgment, we are unable to see how the judgment of nonsuit can be reversed; for, if granted upon the fourth ground, that the plaintiffs had failed to show that the location of the Lalande claim was made upon vacant and unoccupied public land, we find no evidence in the transcript upon this point. If such testimony was given in the court below, it has not been brought here for our examination. We must therefore presume that none was given, and such being the case, the court below properly granted the nonsuit. In *Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301, it was

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held in substance that, where neither party showed a compliance with the requirements of law in regard to work done upon a claim like the one at bar, the findings should be against both.

The right of possession is the question to be determined in this suit; and in full accord with the principles enunciated above is *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 110, wherein the court says: "A valid and subsisting location of mineral lands, made and kept in accordance with the provisions of the statute of the United States, has the effect of a grant by the United States for the right of present and exclusive possession of the lands located. If, when one enters upon lands to make a location there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second. . . . To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute superior in right to that of the defendants. His location must be one that entitles him to possession as against the United States, as well as against another claimant. If it is not valid against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated."

Applying this principle to the case at bar, if the plaintiffs have failed to show a valid location, they cannot recover, and they have no longer any standing in court, unless, perhaps, to try and defeat the defendants' claim so as to prevent the defendants from recovering costs against them as provided in the act of March 3, 1881, which provides that where the title to the ground in controversy shall not be established by either party, no costs shall be allowed.

It follows, we think, that the nonsuit was properly granted, but it should have been without costs. The judgment of the court below is therefore modified so as to read that it is ordered and adjudged that the plaintiffs take nothing by this action, and this action be, and the same is hereby, dismissed, without costs to either party. This judgment of nonsuit, as modified, is affirmed.

Buck and Broderick, JJ., concurring.

## Argument for Appellant.

(February 23, 1887.)

## PALMER ET AL. v. UTAH AND NORTH RAILWAY COMPANY.

[13 Pac. 425.]

**PLEADING—SPECIAL DEMURRER.**—Defects in pleading which make them uncertain are special grounds of demurrer under our code, which cannot be taken advantage of on general demurrer.

**IMPROPER CONDUCT OF PARTY—INFLUENCING JURY—GROUND FOR REVERSAL.**—A judgment in favor of a party guilty of improper conduct calculated to influence the jury, or any juror, in their favor in rendering the verdict, should be reversed and a new trial granted on the ground of public policy.

**RAILROAD CORPORATION—NEGLIGENCE—SERVANTS—FELLOW-SERVANTS.**—A railroad corporation is liable for damages to employees injured through the negligence of their agents or servants who are invested with a controlling or superior duty in the management of the business of the corporation.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

P. L. Williams and Homer Stull, for Appellant.

To determine who is the proper party plaintiff, the complaint must show, by averment, whether the deceased was a minor or major, and the plaintiff must then be the person indicated by the statute. The essential facts in every case must be averred directly, and cannot be left to inference. (*Harris v. Hillagass*, 54 Cal. 463; *Stringer v. Davis*, 30 Cal. 318.) An employee in the bridge department of a railroad and a telegraphic operator are fellow-servants. (*Russell v. Railroad Co.*, 17 N. Y. 134; *Laning v. Railroad Co.*, 49 N. Y. 521, 10 Am. Rep. 417; *Wonder v. Railroad Co.*, 32 Md. 411, 3 Am. Rep. 143, and note; *Lawler v. Railroad Co.*, 62 Me. 463, 16 Am. Rep. 492, and note; *Seaver v. Railroad Co.*, 14 Gray, 466; *Gilman v. Railroad Corp.*, 10 Allen, 233, 87 Am. Dec. 635.) Misconduct of a suitor is sufficient to reverse a judgment. (*Rose v. Smith*, 4 Cow. 17, 15 Am. Dec. 331; *People v. Douglass*, 4 Cow. 26, 33, 15 Am. Dec. 332; *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253, and note; *Brandt v. Fowler*, 7 Cow. 562; *Wilson v. Abrahams*, 1 Hill, 207;

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*Jackson v. Smith*, 21 Wis. 26; *State v. Hartmann*, 46 Wis. 248, 50 N. W. 193; *McIntire v. Hussey*, 57 Me. 493; *Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193.) The proof should have been confined to the defect alleged. (*Batterson v. Railway Co.*, 49 Mich. 184, 13 N. W. 508; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358.)

H. M. Bennett and Smith & Wright, for Respondents.

Where a defect of parties exists, the objection must be taken by demurrer, or it will be waived. (*Dunn v. Tozer*, 10 Cal. 167; *Mott v. Smith*, 16 Cal. 557; *Sampson v. Schaeffer*, 3 Cal. 202; *Burroughs v. Lott*, 19 Cal. 125; *Barber v. Reynolds*, 33 Cal. 497.) The fact that deceased was riding on a pass in no wise affects the question of defendant's liability. (*Railroad Co. v. Derby*, 14 How. 483; *Ohio etc. Ry. Co. v. Selby*, 47 Ind. 492, 17 Am. Rep. 719; *Railroad Co. v. Muhling*, 30 Ill. 23; *The New World v. King*, 16 How. 472; *Railroad Co. v. Horst*, 93 U. S. 296; *Railroad Co. v. Lockwood*, 17 Wall. 374, 10 Am. Rep. 366, note.) The deceased was killed by the negligence of either telegraph operator or train-dispatcher; both of them were agents of defendant, and were not "fellow-servants" of deceased, within the meaning of that term as used in law. (*Gillenwater v. Railroad Co.*, 5 Ind. 339, 61 Am. Dec. 101; *Bowers v. Railroad Co.*, 4 Utah, 215, 7 Pac. 251; *Cunningham v. Railway Co.*, 4 Utah, 206, 7 Pac. 799; *Kielley v. Mining Co.*, 3 Saw. 437, Fed. Cas. No. 7760; *Chicago etc. R. R. Co. v. Morando*, 93 Ill. 302, 34 Am. Rep. 168; *Darrigan v. Railroad Co.*, 23 Am. & Eng. R. R. Cas. 438; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Railroad Co. v. Crockett*, 19 Neb. 139, 26 N. W. 921; *Chicago etc. R. Co. v. Lundstrom*, 16 Neb. 256, 49 Am. Rep. 718, 20 N. W. 198; *Railway Co. v. Condon*, 17 Am. & Eng. R. R. Cas. 583; *Railroad Co. v. Collins*, 5 Am. Law Reg., N. S., 266.)

BUCK, J.—On the eleventh day of December, 1885, the defendant, a corporation, was running a passenger train on its road, which was derailed, and thrown from the track, and one William O. Palmer, an employee of defendant, riding thereon at the time of the accident, was killed by a car falling upon him. It is claimed by plaintiffs that the accident was caused by a broken

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rail which defendant carelessly and negligently allowed to be and remain on the track. The action was brought by Linnie M. Palmer, widow of deceased, and Alfred Perle Palmer, minor son of deceased, by W. F. Fisher, guardian of said minor. The defendant interposed a general demurrer to the complaint, on the usual ground, "that it does not state facts sufficient to constitute a cause of action."

That part of the complaint relied upon by attorneys for defendant in the argument of the demurrer is in the following words: "That the plaintiff Linnie M. Palmer is the widow of William O. Palmer, deceased, and that the plaintiff Alfred Perle Palmer is the son of Linnie M. Palmer and William O. Palmer, deceased; that Alfred Perle Palmer, one of the plaintiffs herein, is an infant under the age of ten years, and that W. F. Fisher was duly appointed such guardian *ad litem* by the Hon. J. B. Hays, judge of this court, on the twenty-eighth day of April, 1886; and that said deceased died intestate."

It is agreed by both parties that the sufficiency of the complaint is to be determined by sections 191 and 192 of our code, which are as follows: "Sec. 192. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Section 191 provides that, if the deceased is a minor, the father and mother may bring the action.

The appellant argues that the complaint is bad in that it does not allege whether the deceased was a minor or major. He claims, in terms, that the question is not whether there is a cause of action in the abstract, but whether the facts stated constitute a cause of action in favor of plaintiffs. We are not prepared to concede the correctness of appellant's position. We think the question is: 1. Whether there is a cause of action; and, 2. Whether the plaintiffs are the proper parties. There can be no doubt that they are the parties directly interested in the action. The appellant claims that whether they are the proper parties to bring the action under the code depends upon whether the deceased was a minor or major, and that that is not shown by the complaint. It seems that such omission, if such exists, would cause only an uncertainty, which under our code is a distinct

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cause of demurrer. Such an objection does not go to the substantive cause of action, and we think cannot be taken advantage of under a general demurrer. (*Blanc v. Klumpke*, 29 Cal. 156; *Slattery v. Hall*, 43 Cal. 191.)

In *Jamison v. King*, 50 Cal. 136, the defendant demurred to the complaint on the ground that it was ambiguous, unintelligible, and uncertain, in that certain facts did not appear therein. The court says: "The defendant had the right to be informed whether the plaintiff claimed that the instrument was of no effect because not delivered, or, having been delivered, that it operated only as *donatio causa mortis*. Defendants are entitled to a distinct statement of the facts by plaintiff claimed to exist. The complaint is ambiguous and uncertain, and the demurrer ought to have been sustained." So, in the case at bar, perhaps the defendant had a right to be informed as to whether the deceased was a minor or a major, in order to enable it to know whether the plaintiffs were proper parties, and, if this did not appear by the complaint, it was ambiguous and uncertain; but this defect must be specially set out in the demurrer, and cannot be taken advantage of upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The second assignment of error is that the court erred in refusing a continuance on the ground of the absence of one Braddock, a witness for defendant. An inspection of the affidavit upon which the motion for a continuance was made shows that said witness would testify that he was on the scene of the accident soon after it occurred; that said Braddock possessed special knowledge of the condition of the defendant's roadway and track at and about the point of the accident; that said witness supervised the removal of said broken rail, and personally inspected the same; that the broken end or surface showed a complete and entirely new fracture, and that the external appearance thereof gave no indication of any defect therein; and that, by reason of the special knowledge of said witness as an expert in the structure and maintenance of roadway and track of a railway, and the particular characteristics and distinguishing features of the fractures of iron and iron rail, the defendant will not be able to supply the proof, etc. The peculiarity of this affidavit, as considered in connection with appellant's argument, is that it does

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not allege that said witness is an expert in any sense, or that he has any special knowledge as an expert. It does not set out that witness has any special knowledge of the condition of defendant's roadway and track at and about the point of the accident, and it nowhere alleges that he has any other special knowledge. The substantive fact desired to be proven by said witness was that the appearance of the broken rail indicated a complete and entirely new fracture, and the external appearance thereof gave no indication of any defect therein. Although for some reason the record does not show it, yet it is admitted by the attorneys in this court that the motion was overruled upon the admission by attorneys for plaintiffs that the witness would testify, if present, as is set out in the affidavit of continuance, and it was so considered at the trial. Section 364 of our code provides that upon such admission the trial must not be postponed.

The third error assigned is that the evidence does not justify the verdict, in that it does not show that the accident was the result of a broken rail, which defendant carelessly and negligently permitted to remain on the track. An inspection shows that the evidence upon this point was submitted to the jury by both plaintiffs and defendant. Its consideration was within the special province of the jury, and we see no reason to disturb their verdict.

The fourth error assigned is that the court erred in refusing to give instructions 3, 4, and 5, requested by the defendant. The foundation for these instructions is in the fact claimed by defendant that the deceased received the injury of which he died in consequence of the carelessness and negligence of a fellow-servant, both being in the employment of the defendant. There was evidence tending to show that one Sherman, station agent at Camas, a station about five miles from the scene of the accident, had received notice several hours before the accident that there was a bad place in the road five miles from said station; that his duty was to notify the proper officers of the company, that the same might be repaired, and also the conductors of passing trains, that they might guard against it; that he neglected to do so, and, in consequence of said neglect, the broken rail was not removed until after the train upon which deceased was rid-

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ing was thrown from the track. It is claimed by appellant that, admitting all this, yet the agent, Sherman, was a fellow-servant of the deceased, Palmer, and that the company is not liable for the accident to Palmer resulting from the carelessness or negligence of his fellow-servant, Sherman. Palmer was a carpenter, and had no relations or connection with the station agent, Sherman. It is admitted by appellant that Sherman's duties were the same as a train-dispatcher, as far as they relate to the case at bar. The importance and applicability of said instructions depend upon the legal proposition that Palmer and Sherman were fellow-servants, in the sense that the one cannot recover for injuries resulting from the carelessness of the other.

The general proposition that an employer is exempt from responsibility, where injury results to one servant from carelessness or negligence of another, is now said to be well settled. (Cooley on Torts, 642.) "There seems, however, to be a strong disposition to hold that the rule does not apply where, at the time of the injury, the servant injured was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted." (Cooley on Torts, 543.) We think such was the relation of the deceased, Palmer, to the station agent, Sherman, and the question for us to determine is whether said rule of law should apply to such a case.

The authorities cited by the respective attorneys in their arguments constitute an able collation of adjudicated cases bearing upon this question. The weight of such authorities, considered by their number, seems to be in favor of the doctrine that the employer is exempt from liability where the injury results to one servant through the carelessness of another, without regard to the connection which the servants have with each other. Opposed to this view, however, is a smaller number of cases from high authorities, which hold that the employer is not exempt from such liability where employees are injured through the negligence of officers and agents who are invested with a controlling or superior duty in the care of the business in which the servant is engaged. (*Hough v. Railway Co.*, 100 U. S. 213.) .



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In the case at bar the agent, Sherman, represented the defendant at the station where he was located. It was his duty to prevent accident by warning the conductor of the passing train of the bad place in the track, and to cause the broken rail to have been removed, and a sound one put in its place, before a train should pass over it. The deceased was employed as a carpenter on the road, in a department wholly disconnected with that in which the agent, Sherman, was employed.

After a careful examination of the authorities, we feel bound to adopt the doctrine enunciated by the supreme court of the United States, whose decisions are controlling upon all territorial courts. In the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, the principle is established that, where an agent is clothed with the control and management of a distinct department, the company is liable to an employee injured by the carelessness of such agent. Under this authority we think that the deceased, Palmer, was not a fellow-servant of the agent, Sherman. Both were employees of defendant, but in entirely distinct departments of labor. In this view the said instructions were irrelevant and misleading, and properly refused.

The sixth instruction asked by defendant, and refused, is to the effect that the deceased is bound by the conditions of a certain pass, designated in appellant's brief as a "gang pass," upon which he and other workmen were riding when the accident occurred. The pass was between different parties than those interested in this action. The deceased had never signed it, nor assented to its conditions, and we think the defendant not in a condition to avoid liability upon the conditions of a pass issued by the Union Pacific Railway to one Barraclaugh. We think the pass no defense to the action, and that this instruction was properly refused.

The only remaining assignment of error which we deem it necessary to consider is that of irregularity in the proceedings of the jury and adverse party. The affidavit of P. L. Williams in support of this assignment, among other things, says "that William Mester was a juror in the trial of the cause; that during said trial he was engaged in the business of saloon keeping at Blackfoot, where the court was sitting; that, as affiant is informed and verily believes, W. F. Fisher, father of one of the

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plaintiffs in the action, and grandfather to the other plaintiff, Alfred Perle Palmer, for several days before the said trial began, and during all the time it was in progress, was a frequent and liberal patron of said saloon, and that during the progress of said trial, and especially during the evenings and nights of the said twenty-seventh and twenty-eighth days of May aforesaid, treated and entertained in said saloon large numbers of his friends and acquaintances; and, as affiant is informed and believes, that during said evenings different members of the jury impaneled to try said cause drank liquor in said saloon with the said Fisher, at his expense; and that during a portion of the time that said Fisher was so in said saloon on the evening last aforesaid, and treating and entertaining the said persons, the said Mester was present, and waited upon and assisted in waiting upon the said Fisher and his guests and friends; that during one of the said nights, near the hour of 2 o'clock A. M., as he is informed and believes, he was awakened from sleep in the hotel by the approach of a noisy, tumultuous, and boisterous crowd of men, coming from the direction of said saloon, some of whom were talking loudly, some singing, some one playing a banjo, and distinctly, above the din and uproar, affiant could distinguish the voice of said Fisher." To this affidavit the said Fisher replies in a counter-affidavit, and alleges that for six years prior thereto he had frequently patronized said saloon; that his reason for so doing was that said Mester kept the best liquor in town, and that on one or two occasions during said trial he drank at the bar of said Mester, and treated some of his friends; but denies that during said trial he treated any member of said jury, or drank with any of them, or that said Mester waited on him at said bar during said trial. Mr. Fisher does not deny that he patronized said saloon, or that said Mester and other members of the jury were present on such occasions, as alleged in the affidavit, of said Williams.

We are unable to say what effect this liberal and conspicuous patronage during the trial may have had upon the mind of the juror whose bar he was patronizing. It is not necessary for us to find that it had effect upon the verdict in order to sustain this assignment of error as to irregularities of an adverse party. It is enough to find that it was calculated so to do. It is per-

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haps impossible for the juror himself to appreciate what influence this patronage may have had upon his mind.

In *McDaniels v. McDaniels*, 40 Vt. 374, 94 Am. Dec. 408, the court says: "There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law, and upon the evidence in court. The court set aside the verdict in justice to themselves as well as the defendants: that the trial may be conducted fairly, so that the verdict, when rendered, may be entitled to the respect of both parties, and the confidence of the court."

In *Cottle v. Cottle*, 6 Greenl. 140, 19 Am. Dec. 200, quoted in Hayne on New Trial and Appeal, section 48, the court says: "In case of an alleged attempt to influence a jury, it may be useful for a party to learn that a good cause may be injured, but cannot be promoted, by conduct of this sort, and to the public generally to know that it will be tolerated in no case whatever."

In *Cilley v. Bartlett*, 19 N. H. 324, where statements were made within hearing of one of the jurors, by a party without knowing that the juror was present, the court says: "There will be no security for the proper administration of justice if a party, while his case is on trial, can be permitted to make statements denouncing witnesses, during adjournment, and after the jury have separated, whether he is aware of the presence of the juror or not. If he will conduct in this manner, he must take the risk of the consequences on himself. The presumption is, where jurors hear such statements, they are more or less affected by them. It is necessary that such conduct should be discountenanced, and the defendant is entitled to a new trial."

In the case at bar it is not alleged that the plaintiff Fisher made any direct attempt to influence the verdict by denouncing the opposite parties, or their witnesses, but that his generous patronage at the bar of one of the jurors was intended and calculated to influence a verdict in his favor.

In *Knight v. Inhabitants of Freeport*, 13 Mass. 217, the court says: "We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due

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confidence to parties in the results of their causes, and every one ought to know that for any, even the least, intermeddling with jurors a verdict will always be set aside.”

In Thompson and Merriam on Juries, 406, the practice is stated as follows: “Where the successful party to a suit is shown to have attempted by improper means to influence the verdict in his favor by corrupting or intimidating particular jurors, or arousing prejudice in their minds by undue hospitalities or civilities, the verdict will be set aside on the grounds of public policy, without reference, and without considering whether the attempt was successful or not.”

These authorities establish the practice that, whenever the adverse party is guilty of conduct calculated to influence a verdict afterward rendered in his favor, a new trial will be granted as a matter of public policy, and to secure a pure administration of justice. What effect the conduct of the party in the case at bar may have had upon the juror it may be impossible to determine. He was pursuing an occupation authorized by law, and if Mr. Fisher frequented his place of business, and expended liberal sums of money in the entertainment of his friends, with his partner in business, and in his presence, or to the knowledge of the juror and other jurymen, as is alleged, and not denied by Mr. Fisher, the court will not attempt to calculate its influence upon the verdict. Such conduct is entirely reprehensible, as an attempt to corrupt the administration of justice. The party thus attempting to interfere with the trial of causes is not only guilty of contempt of court, and liable to punishment therefor, but he cannot be allowed to profit by a verdict in his favor procured under such corrupting influences.

We find no error in the law occurring at the trial, but, on the ground of irregularity by and in behalf of the party in whose favor the verdict was rendered, the judgment is reversed, and the cause remanded for a new trial.

Broderick, J., concurring.

Hays, C. J., expressing no opinion.

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Argument for Respondents.

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(February 14, 1887.)

## BROADBENT ET AL. v. JOHNSON.

[13 Pac. 83.]

GRATUITOUS SUBSCRIPTION—MERE OFFER—NUDUM PACTUM.—A gratuitous subscription with only one signer is but an offer, which until accepted by the promisee in express terms or by a performance of the conditions stipulated therein is but a *nudum pactum*, and cannot be enforced against the will of the subscriber by suit at law.

APPEAL from District Court, Ada County.

D. P. B. Pride, for Appellant.

As to the second assignment of error: The evidence shows no damage to the respondents by reason of appellant's subscription—admitting that the respondents were parties to the instrument (which the complaint does not show, neither does the evidence); they "could sustain no action upon it until after the condition had been performed, and then the measure of recovery would be, not the sum stated as the amount of the promised subscription, but the damage which the persons bringing the action had sustained." The complaint in this case contains none of these elements; neither does the evidence show any damage to respondents on account of appellant's subscription. (*Lake Ontario Shore R. R. Co. v. Curtiss*, 80 N. Y. 323; *Homan v. Steele*, 18 Neb. 652, 26 N. W. 473; *McDonald v. Gray*, 11 Iowa, 509, 79 Am. Dec. 509.) The general rule of law is that, in order to support an action, the promise must have been made upon a legal consideration, moving from the promisee to the promisor. No consideration ever flowed from these respondents to the appellant. (*Felt v. Juda*, 3 Utah, 414, 4 Pac. 243, and cases cited; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Law v. Foss*, 121 Mass. 531; *Trustees of Hamilton College v. Stewart*, 1 N. Y. 586.)

Huston &amp; Gray, for Respondents.

A subscription to a common object with others, though gratuitous, creates a legal liability. (*Norton v. Janvier*, 5 Harr.

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346; *McDonald v. Gray*, 11 Iowa, 508, 79 Am. Dec. 509; *Comstock v. Howd*, 15 Mich. 237; *State Treasurer v. Cross*, 9 Vt. 289, 31 Am. Dec. 626.) When advances have been made, or expenses or liabilities incurred by others, in consequence of voluntary subscriptions, before notice of withdrawal, this will be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions. (*Gittings v. Mayhew*, 6 Md. 113; *Homes v. Dana*, 12 Mass. 190, 7 Am. Dec. 55; *Doyle v. Glasscock*, 24 Tex. 200; *Parsonage Fund v. Ripley*, 6 Me. 442; *Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *Bryant v. Goodnow*, 5 Pick. 228.) A subscription becomes a contract when accepted by the beneficiaries and acted upon by the incurring of an obligation or the expenditure of money. (*McCabe v. O'Connor*, 69 Iowa, 134, 28 N. W. 573; *Osborn v. Crosby*, 63 N. H. 583, 3 Atl. 429, and note, p. 431; *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888; *United Presb. Church v. Baird*, 60 Iowa, 237, 14 N. W. 303; *Homan v. Steele*, 18 Neb. 652, 26 N. W. 472.)

BUCK, J.—This action was brought to recover the sum of \$500 subscribed by the defendants toward the building of a branch railroad from the Oregon Short Line Railroad to Boise City. The subscription is in the following words, to wit:

**"SUBSCRIPTION FOR A RAILROAD TO BOISE CITY.**

"We, the undersigned, citizens and property holders of Boise City and vicinity, Ada County, Idaho territory, hereby, each for himself, agrees to pay the amount set opposite his respective name, to the Union Pacific Railroad Company, upon consideration that the said Union Pacific Railroad Company shall build a branch railroad from some point on the Oregon Short Line Railroad, hereafter to be determined upon by S. H. H. Clark, general manager of said Union Pacific R. R. Co., to Boise City, Idaho; the construction of such branch road to be commenced and completed within a reasonable time; said amounts to be due and payable to Jeremiah Brumback, John Lamb, and John Broadbent when required; said Brumback, Lamb and Broadbent

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being duly authorized to collect and pay over said money subscribed by us.

“Boise City, December 7, 1883.

Dollars

[Signed]

“O. P. JOHNSON, - - - \$500.”

The complaint states that the said Clark located the road to Boise City, and that the said Union Pacific road, through the Oregon Short Line Railroad, surveyed and located said branch road from the town of Caldwell to Boise City, and did procure the right of way and depot grounds, and did promise and agree to and with defendant, among others, to build and construct said branch road, and have commenced the construction thereof; that the said promise and agreement of said Union Pacific Railroad was upon the condition that the said Oregon Short Line road should receive good and sufficient deeds of said branch line, roadbed, depot grounds, and twenty acres of ground for shops; that the said Oregon Short Line did locate said branch line to Boise City, and two miles above said city, and that the defendant and other subscribers did assent, after said subscription, that the amount subscribed by him and them should be used to procure and purchase said right of way, shop and depot grounds; that J. Brumback and J. H. Bush were appointed by defendant and other subscribers to procure said right of way; that they procured the same, and delivered to said Oregon Short Line road good and sufficient deeds therefor, and did pay out and expend about \$40,000 for the same; that the defendant has paid no part of said \$500; and that the same is now due and owing.

To this complaint the defendant interposed a demurrer, upon the grounds, among others, of nonjoinder of parties, and that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, to which ruling the defendant excepted. The defendant thereupon filed his answer denying the allegations of the complaint, and alleging that the same was procured by fraud. The action was tried at the April term of court, 1886, and the jury returned a verdict for plaintiff for the amount claimed, \$500. From the judgment entered upon the verdict the defendant appeals, and brings the

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cause into this court on a bill of exceptions. Among the errors specified in the bill of exceptions is:

1. That the court erred in overruling plaintiff's demurrer to the complaint. In considering the merits of the demurrer, we notice that the subscription set out in the complaint is not a mutual one, to which there are several signers. The defendant, O. P. Johnson, is the only signer thereto. If there were others, it is not so alleged in the complaint, and it does not so appear in the record. It is unilateral. For this reason much of the argument, and many of the authorities cited, on appeal, do not seem applicable to the facts of the case as they appear in the record. The obligation set out in the complaint is a written offer by defendant to the Union Pacific Railroad Company to pay the company \$500 if they will build a branch road connecting Boise City with the Oregon Short Line Railroad, and specifying that the plaintiffs in this action are authorized to collect the same, and to pay the same to said company. The document contains no acceptance on the part of the company. In and of itself it is a naked offer—a promise without a consideration—and not binding on the subscriber. (*Utica etc. R. R. Co. v. Brinckerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 529, 23 Am. Rep. 286; *Livingston v. Rogers*, 1 Caines, 585; *Trustees etc. v. Stewart*, 1 N. Y. 581.) It has none of the elements of a mutual promise between different signers of a subscription, which the courts have held to be a sufficient consideration between the several subscribers.

The complaint, however, alleges that, after the subscription was made, the said Union Pacific Railroad promised and agreed to and with defendant and others to build said branch road upon the consideration that the Oregon Short Line Railroad should receive good and sufficient deeds to their roadbed, depot grounds, and ground for shops, and that defendant assented thereto; that thereupon, upon such assent, one J. Brumback and J. H. Bush were appointed by the defendant and other parties subscribing to procure said right of way in January, 1884, to secure the same, which they did, relying upon said subscription, at an expense of about \$40,000.



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Accepting this statement to be true, as admitted by the demurrer, it seems that the proposition of defendant to the Union Pacific Railroad, made by the terms of said subscription dated December 7, 1883, was met by a counter-proposition from said company to defendant and others to build the road if they could be given the right of way, and that defendant, with others, assented to the counter-proposition in January, 1884; that, pursuant thereto, defendant and others appointed J. Brumback and J. H. Bush to procure said right of way; and that said Brumback and Bush accepted such employment, and procured said right of way at an expense of about \$40,000. The agreement under which said right of way was secured, as is set out in the complaint, was subsequent to and entirely distinct from the subscription upon which this action is founded. The subscription was dated December 7, 1883. The arrangement for right of way was made in January, 1884. If the defendant was a party to the agreement as proposed by the railroad company in January, 1884, the subscription of December 7, 1883, was only referred to as fixing the amount of his liability. Whatever obligations defendant may have assumed under the arrangement to secure the roadbed must have been under the subsequent agreement, and not on the subscription set out in the complaint. Said subscription being void for want of mutuality—a mere *nudum pactum*—the plaintiffs could acquire no authority from it to bring this action, or to collect the amount subscribed; nor can the defendant be forced to pay upon a void obligation. If defendant is liable at all, it must be to parties other than the plaintiffs, and upon some other obligation than that set out in the complaint.

We are of the opinion that the demurrer should have been sustained, and the judgment is reversed.

Hays, C. J., and Broderick, J., concur.

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Argument for Respondents.

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(February 28, 1887.)

COOPER ET AL. v. KELLOGG ET AL.

[13 Pac. 350.]

**PLEADINGS—FINDINGS—JUDGMENT.**—Where the findings are responsive to all the material issues raised by the pleadings, and are warranted by the testimony, and they support the judgment and no errors at law appearing, the judgment will be affirmed.

(Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.

Richard Z. Johnson, William H. Clagett and Albert Allen, for Appellants.

Contradictory findings will not support a judgment. (*Reese v. Corcoran*, 52 Cal. 495; *Manly v. Howlett*, 55 Cal. 94; *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574; *Carman v. Ross*, 64 Cal. 250, 29 Pac. 510; *Baker v. Riordan*, 11 Pac. C. L. J. 324.) The findings must respond to the issues. Every material issue must be disposed of. (2 Hayne on New Trial and Appeal, sec. 242, p. 723; *Knight v. Roche*, 56 Cal. 15, 25; *Masters v. Lash*, 61 Cal. 623; *Laughlin v. Wright*, 63 Cal. 113; *Boggs v. Smith*, 53 Cal. 88; *Shaw v. Wandersford*, 53 Cal. 300.) Facts not in issue need not be found, and if they are found, the finding is nugatory. (2 Hayne on New Trial and Appeal, sec. 242; *Devoe v. Devoe*, 51 Cal. 543; *Marks v. Sayward*, 50 Cal. 57; *Gregory v. Nelson*, 41 Cal. 284; *Morenhout v. Baron*, 42 Cal. 605.) Under the law, four certain things are to be done in order to perfect a location: "1. . . . 2. The posting of notice at the place of discovery, giving the name of the lode, the name of the locator and the date of discovery; 3. Marking the surface boundaries of the claim by posts, in the manner pointed out by statute; and 4. Making and recording a location certificate." (*Strepey v. Stark*, 7 Colo. 618, 5 Pac. 111.)

W. W. Woods and W. B. Heyburn, for Respondents.

When no findings appear, and the record does not show whether they were waived, it will be presumed that the court found the facts necessary to support the judgment. (*Glen v.*

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*Arnold*, 56 Cal. 631; *Utter v. Eames*, 59 Cal. 5; *Cummins v. Howard*, 63 Cal. 503; *Cole v. Bacon*, 63 Cal. 571.) A material issue may become immaterial so as to require no finding by reason of a finding upon another issue. (*Porter v. Woodward*, 57 Cal. 535; *McCourteney v. Fortune*, 57 Cal. 617. See *Davis v. Drew*, 58 Cal. 152.) Mining prospecting partnerships are valid. (*Boucher v. Mulverhill*, 1 Mont. 306; *Saurtry v. Dunlop*, 12 Wis. 364; *Settenbre v. Putnam*, 30 Cal. 440.) As to prospecting contracts and the law of admissions. (*Welland v. Huber*, 8 Nev. 203.) Legal relations of owner and adventurer. (*Henderson v. Allen*, 23 Cal. 519.) Sale in disregard of outfitter. (*Murley v. Ennis*, 2 Colo. 300.)

HAYS, C. J.—This case is founded upon a contract which was entered into between the plaintiffs and defendant Kellogg, wherein plaintiffs were to furnish said defendant with a prospector's outfit known in miner's parlance as a "grubstake," in consideration of which Kellogg was to do certain prospecting, and to give to plaintiffs a one-half interest in all mining claims discovered by him. Kellogg received the outfit, and did the prospecting. It is claimed by the plaintiffs that Kellogg discovered all of the mining claims for which this suit is brought while working under said contract as a prospector, and that he made location of some of them; but that he afterward, for the purpose of defrauding plaintiffs, procured defendant O'Rourke, without plaintiffs' knowledge or consent, to accompany him, and to take down the location notice put up by Kellogg, and to relocate the premises in the name of O'Rourke. All of which defendants deny, and claim the Bunker Hill, the only claim now in controversy here, was discovered by O'Rourke alone. Upon the trial a jury was called, and special questions submitted to them, upon which they found the facts. The court adopted a portion of their findings of fact, and further found that "on September 10, 1885, Kellogg became the owner, by location, of an undivided one-half interest in the Bunker Hill lode; that at the time he acquired this interest by location, he was under a contract with plaintiffs, by which they were to have a half interest in all mining property located or acquired by him; that plaintiffs were the

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owners of one-half of Kellogg's interest in the Bunker Hill acquired by him by location on September 10, 1885; that prior to September 10th, while said contract existed between plaintiffs and Kellogg, Kellogg knew of the existence of mineral-bearing rock on the Bunker Hill mine, and indications of mineral there, as caused him and O'Rourke to locate the same for their joint benefit." And, as a conclusion of law, the court found "plaintiffs entitled to a decree against Kellogg and O'Rourke for an undivided one-fourth interest of the Bunker Hill mine, as they held the same September 10, 1885, and in all interests acquired by them since that date." Judgment was entered in accordance with the findings of fact and conclusions of law.

The findings, we think, cover all the material issues raised by the pleadings, and are sufficient to support the judgment. After a careful examination of the whole case, which is very voluminous, we find it more a question of fact than of law, and upon the question of fact we have no hesitancy in saying we think the findings fully sustained by the evidence. If the defendants, Kellogg and O'Rourke, have acted in good faith, and did not intend to defraud these plaintiffs out of their legitimate interest in the Bunker Hill claim, they are certainly unfortunate in having their transactions, as detailed by themselves, laden with many badges of fraud. We are unable to see how any impartial mind can arrive at a different conclusion. Their conduct relative to this mine is consistent with this theory, and inconsistent with any other.

We have examined all the assignments of error, and deem it unnecessary to discuss them in detail, inasmuch as we find no error that would warrant a reversal of the judgment. Judgment affirmed.

Broderick and Buck, JJ., concurring.

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Argument for Appellants.

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(February 28, 1887.)

## SCHULTZ ET AL. v. KEELER ET AL.

[13 Pac. 481.]

**EXCEPTIONS, BILL OF, WILL BE TREATED AS STATEMENT.**—A bill of exceptions settled and signed by the trial judge will be treated as such, although it is denominated a statement.

**FINAL DECISION—MOTION FOR NEW TRIAL—ORDER DENYING APPEALABLE.**—The organic act of the territory does not prohibit the legislative assembly from authorizing an appeal from an order of the district court, overruling a motion for a new trial.

**INSTRUCTIONS—LOCATING CLAIM BY AGENT.**—The instructions given to the jury to the effect that one cannot initiate the location of a mining claim through an agent, etc., examined and held erroneous. (Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.

W. B. Heyburn, for Appellants.

The court erred in instructing the jury in effect that a mining claim could not be located by an agent. (2 Estee's Pleadings, sec. 2252; *Gore v. McBrayer*, 18 Cal. 582; *Murley v. Ennis*, 2 Colo. 300; *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Morton v. Solambo*, 26 Cal. 527.) It is not against public policy to allow a partner or agent to locate a mining claim for and in the name of another in his absence. (*Boucher v. Mulverhill*, 1 Mont. 310.) Although the verdict may be in accord with the weight of evidence, if the essential points in dispute were by the charge withdrawn from the consideration of the jury, a new trial will be granted. (Hilliard on New Trials, p. 46.) A court will presume injury from an error in the court below, unless the record itself refutes the presumption and shows affirmatively that no injury could have resulted. (*People v. Furtado*, 57 Cal. 345; *McDougal v. Central R. R. Co.*, 63 Cal. 431; Hilliard on New Trials, p. 45; *Fullam v. Cummings*, 16 Vt. 697.) Motion for new trial suspends life of judgment until suit is disposed of. (Hilliard on New Trials, c. 5, p. 59; *Edwards v. Edwards*, 22 Ill. 121; *Wright v. Haddock*, 7 Dana, 253.) There is no difference between a statement and a bill of exceptions in form or substance, except that

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the former follows a notice of motion for new trial. (*People v. Crane*, 60 Cal. 279.)

William H. Clagett and Albert Allen, for Respondents.

The marking of the boundaries by plaintiffs was one of the issues in the case. The jury, by its general verdict, found they were not marked. In the statement the judge certifies that the evidence proved they were. The verdict was not set aside, and the record, therefore, on its face contains a false recital of fact. (*Hidden v. Jordan*, 28 Cal. 303; 1 Abbott's Digest, p. 527, sec. 13.) Until set aside, the verdict was conclusive upon the court below, and this court should not consider a question where the alleged error is only apparent, by the incorporation in the statement of a recital of fact, which the jury in their verdict find otherwise. (*Jones v. Buckell*, 104 U. S. 556; *Reed v. Gardner*, 17 Wall. 411.) There is no appeal from an order granting or refusing a new trial. (*Henderson v. Moore*, 5 Cranch, 11; *Pomeroy v. Bank Ind.*, 1 Wall. 597, 598; *Desty's Federal Procedure*, 691, 692.) In *Morton v. Salambo*, 26 Cal. 527, the facts were similar to those in *Gore v. McBrayer*, 18 Cal. 582, and the court, repudiating the idea that the law or agency cut any figure in the case, rested its decision upon the mining custom of the district expressly authorizing one to locate for himself and others (pp. 531-534). The law of 1872 nowhere authorized a mining claim to be located by an agent. This act is a pre-emption law. (*Belk v. Meagher*, 104 U. S. 284.)

BRODERICK, J.—This action is in the nature of ejectment, brought to recover the possession of certain placer mining ground situated in Shoshone county. The case was tried before the court with a jury. Verdict and judgment in favor of defendants. The plaintiffs moved for a new trial, which motion was overruled, and from this order and decision the plaintiffs appealed. The motion was made upon a bill of exceptions which contains the substance of a portion of the evidence, and also certain instructions given to the jury, and an exception taken by the plaintiffs to the giving of these instructions. The error assigned is the giving of the instructions

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set out in the bill of exceptions, and the refusal to grant to plaintiffs a new trial.

At the hearing in this court a preliminary motion to dismiss the appeal was argued, on the ground, among others, that there was no sufficient statement or bill of exceptions in the transcript. The bill of exceptions is somewhat informal, but it contains the charge excepted to, and shows that the objection was made before the jury retired for deliberation, and indicates with sufficient certainty upon what the appellants rely for a reversal of the judgment. It is authenticated by the trial judge, and it makes no difference, under our practice, whether it is called a statement or bill of exceptions. It brings the exceptions here, and we must take this portion of the transcript for what it is, and not for what it may have been called. (*People v. Crane*, 60 Cal. 279; *Bradbury v. Improvement Co.*, ante, p. 239, 10 Pac. 620.) The motion to dismiss is therefore overruled.

Counsel for respondents interpose another preliminary objection to passing upon the merits of this appeal; and it is insisted that this court has no jurisdiction of the case, because section 1869 of the Revised Statutes of the United States allows appeals from the final decisions of the district courts to the supreme court of all the territories respectively, under such regulations as may be prescribed by law. It is therefore contended that an order denying a motion for a new trial is not a final decision, and not appealable. In support of this contention against jurisdiction counsel refers to *McCormick v. Walla Walla Co.*, 1 Wash. Ter. 512. An examination of that case will show that it is not directly in point in the case at bar. In that case a new trial had been granted in the trial court, and on appeal from the order the supreme court said, in substance, that there was no final decision to appeal from. But if that decision does go to the extent that counsel here claim for it, we would still be unwilling to follow it.

Ever since the organization of this territory, litigants have been appealing from orders denying motions for new trials. Our reports show a great number of these cases to have been heard and determined in this court, and now for the first time the right of appeal is questioned. It will be observed that the

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organic act allows appeals from final decisions. Now, if an application for a new trial is overruled, is not the order a final decision? Certainly, so far as the trial court is concerned, it puts an end to the suit. In our opinion it is final, within the meaning of the law, and from such an order or decision an appeal will lie. (*Wyatt v. Wyatt*, ante, p. 236, 10 Pac. 228.)

This brings us to the consideration of the instructions given to the jury, and objected to by the plaintiffs at the time. They are as follows: "The jury are instructed that if they find from the evidence that the alleged location of the plaintiffs of June 11, 1883, was made in one body, including eighty acres of land, and that said location was made in the joint names of Jesse A. Prichard, C. A. Schultz, M. H. Lane, and W. O. Endicott, in the absence of said Schultz and Lane, by A. J. Prichard as their agent, and that before C. A. Schultz and M. H. Lane personally entered the premises, defendants in person made location thereon as required by law, you will find for defendants." "There is evidence tending to show that three of the locators, under the alleged location of June 11, 1883, were absent at the time of the alleged location by plaintiffs, and remained absent until after the location by the several defendants of the mining ground claimed by them respectively, and that the locations in the names of J. A. Prichard, C. A. Schultz, and Mary H. Lane were made by A. J. Prichard, as their agent, in their absence. I instruct you as a matter of law that if the defendants were personally present on the disputed premises, with the purpose of locating the same, and that the plaintiffs Schultz and Lane had never been personally upon the claim, but had duly been represented in making their location by A. J. Prichard, their agent, that the defendants had the better right, and the absent plaintiffs acquired no rights through their agent, as against defendants in possession." "The laws of the United States provide that all valuable mineral deposits in lands belonging to the United States are open and free to exploration and purchase, and the lands on which they are found to occupation and purchase, under regulations prescribed by law. The entry upon mineral lands for such purpose, and complying with the laws in reference thereto, is a location. A valid location of a mining claim practically severs the land



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described therein from the public lands, and withdraws it from the public domain. It is important, therefore, that a person who claims for himself the privilege of holding public land, and appropriating it to his own use at the expense of the public domain, should do so under some specified provision of law. I instruct you that there is no provision of law which authorizes a person to take the necessary steps to initiate the location of a mining claim by an agent in the absence of the principal, and that any such location, or attempted location, made under power of attorney from one who is absent, is unauthorized by law, and void, as against one who personally takes possession of the premises prior to the personal presence of the principal upon the claim."

We think the propositions of law announced in these instructions to the jury too broadly stated. We find nothing in the statutes of the United States that prohibits one from initiating a location of a mining claim by an agent. Counsel for respondents contend that as the acts of Congress do not specifically authorize the location by an agent that they must be construed as forbidding it. We might accept this view, if Congress had legislated upon the entire subject, and had abrogated all other laws and regulations with reference thereto. This has never been done with regard to the public mineral lands, but, on the contrary, Congress, by express enactment, has sanctioned and continued in force all local laws and customs not inconsistent with the laws of the United States. (U. S. Rev. Stats. sec. 2319.) Long prior to the mineral land act of 1872 it had been held by the courts of California that a valid location of a mining claim could be initiated through an agent. (*Gore v. McBrayer*, 18 Cal. 582; *Morton v. Mining Co.*, 26 Cal. 527.) So at that time it was well understood on this coast that the law authorized a location by an agent; or, in other words, that a valid location could be made without the locator participating in person. (2 *Estee's Pleadings and Practice*, 2252.)

The law as interpreted by the courts had been acted upon in all this mining region until it had, in a certain sense, become a rule of property. Congress had full knowledge of the local laws, and, had they intended to change or disaffirm this rule,

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it certainly would have been done by express provision. As there is no such provision, it is a fair presumption arising from section 2319, *supra*, that it was the intention to affirm and continue in force this as well as all local laws and customs, as construed by the courts, not in conflict with the laws of the United States. As bearing upon the question, see *Rush v. French*, 1 Ariz. 99, 116, 25 Pac. 816; *Boucher v. Mulverhill*, 1 Mont. 310; *Murley v. Ennis*, 2 Colo. 300.

To sustain these instructions and this judgment would be holding, in substance, that no one can initiate a location to a mining claim, under any circumstances, unless he be personally present, and participate therein. We do not think the law should be so construed and administered, and, out of the numerous mining cases decided in this country, not one has been cited that so holds. If the parties herein attempted to locate through an agent, and the laws were not complied with as to the manner of locating, or as to performing labor, making improvements, etc., that would be another and different question.

In the first paragraph of the instructions is an intimation that there was evidence tending to show that the plaintiffs and their predecessors in interest located jointly, in one body, eighty acres of ground; that there was but one location, and that it was a part of this joint location in dispute. The evidence not being here, we cannot know the facts, and the record is so imperfect that we would not be warranted in expressing any opinion on the merits, or as to this joint location of the claim; but think, on the whole case, that a new trial should be awarded.

The instructions that a location could not be initiated through an agent, etc., are so clearly erroneous that the error could not have been cured by any others that may have been given. (*Lufkins v. Collins*, ante, p. 150, 7 Pac. 96.)

The judgment is reversed, and cause remanded to the court below for a new trial in conformity with this opinion.

Hays, C. J., concurring.

Buck, J., dissents from the third and last point in the syllabus.

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Argument for Appellants.

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(February 28, 1887.)

## BURKE ET AL. v. McDONALD ET AL.

[13 Pac. 351.]

**MINING CLAIM—PLEADINGS—PRACTICE.**—In proceedings under the Revised Statutes of the United States, sections 2325, 2326, to determine the right of adverse claimant to a mineral location, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but consents to calling a jury and proceeds to trial as in an action at law, and both parties adduce their evidence on the questions of fact involved, it is then too late for the plaintiff to move to have the case declared a proceeding in equity, and to have it decided as such, without the intervention of a jury.

**RIGHT OF POSSESSION OF MINING GROUND—ACTION AT LAW—JURY ALLOWED.**—In proceedings under this act of Congress, the right of possession of the ground in dispute is the gist of the action, the thing to be tried and settled by the controversy, and such proceeding, in this territory, an action at law in which a jury may be demanded as a matter of right to try such controversy, and render a general verdict therein.

**POSSESSION—WHO ENTITLED TO PATENT—ACTION TO DETERMINE.**—So far as the form of action is concerned, it makes no difference who is in or out of possession. The proceeding is simply to determine which party, if either, is entitled to a patent, and in such a case, where the claim is asserted under a location, actual possession is not a material question.

(Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.

A. E. Mayhew, W. B. Heyburn and W. W. Woods, for Appellants.

Courts of equity have no jurisdiction to determine the right of possession. They determine the title to real property, but where an action in the nature of ejectment will determine the controversy as to possession, it should be resorted to. (*Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232.) In the case of *Connecticut Life Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533, the court reaffirms the doctrine by it theretofore held in the case of *Phoenix Ins. Co. v. Doster*, in

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106 U. S. 32, 1 Sup. Ct. Rep. 18, that when a cause finally depends upon the effect or weight of testimony, it is one for the consideration of the jury, under proper instructions as to the principles of law involved. Trial by jury is never to be denied when the law governing the trial is susceptible of such a construction as to preserve it to the parties. Actions of ejectment do not affect the title to property, but the possession. (2 Estee's Pleadings, sec. 2268; *Long v. Neville*, 29 Cal. 131; *Marshall v. Shafter*, 32 Cal. 194.)

F. Ganahl, G. W. Stapleton, and Albert Allen, for Respondents.

By the organic act of the territory of Idaho the district courts are invested with chancery and common-law jurisdiction; the two jurisdictions are exercised by the same court, and under the legislation of the territory. (Code Civ. Proc., sec. 138, p. 26.) The modes of procedure up to the trial or hearing are the same whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state, "in ordinary and concise language," the facts of his case upon which he invokes the judgment of the court. (*Basey v. Gallagher*, 20 Wall. 679, 680.) Exceptions taken in the court below will be treated as waived unless the matters so excepted to are assigned as errors in this court. (*Purdy v. Steele*, 1 Idaho, 216; *Page v. Page*, 1 Idaho, 102; *Lampkin v. Sterling*, 1 Idaho, 122; *Fairbaugh v. Hasterson*, 1 Idaho, 136.) Actions of ejectment, it is true, "do not affect the title to property," "but the right to the possession as between the parties that is tried in ejectment, and this right is title." (2 Estee's Pleadings, sec. 2268; *Long v. Neville*, 29 Cal. 131; *Marshall v. Shafter*, 32 Cal. 194; *Holland v. Challen*, 110 U. S. 20, 3 Sup. Ct. Rep. 495.) The locator and claimant need not be in or remain in possession; possession depends upon location, and not location upon possession. (*Belk v. Meagher*, 104 U. S. 237-283; *Hauswirth v. Butcher*, 4 Mont. 307, 1 Pac. 714; *McKinstry v. Clark et al.*, 3 Mont. 395.)

BRODERICK, J.—This action was commenced under Revised Statutes, sections 2325, 2326, to determine the rights of

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adverse claimants to certain mining ground situated in Shoshone county, Idaho. The complaint sets out the location by plaintiffs of the Tiger lode mining claim, and that the defendants claimed an adjacent mine called the "Poorman lode mining claim," and that they (defendants) wrongfully caused a survey of said Poorman claim to be made so as to cross upon and overlap the said Tiger claim; that defendants made application for a patent to said Poorman claim; that plaintiffs filed in the land office their adverse claim to that portion of the Poorman which overlapped the Tiger claim, and in due time thereafter commenced this action to sustain their adverse claim. The defendants answered the complaint, denying some of its allegations, and admitting others, and then set up claim to and right of possession in themselves to the area in conflict. At the April term, 1886, of the district court, the cause came on for trial. A jury was impaneled, without objection, and the cause tried, as appears from the record, as an action at law before the court and jury. The jury, being unable to agree upon a verdict, were discharged by the court. The defendants then moved for a change of venue, but no order was entered upon the motion.

The defendants next moved the court, "upon the pleadings and all the evidence in the cause, that the court find the facts involved, and render judgment accordingly, upon the ground that it appears from all the evidence that the plaintiffs were, at the time of the commencement of this action, in the possession of, and at all times since have been and now are in the possession of, the ground and premises in controversy, and on the further ground that the evidence and pleadings show that the action is a proceeding in equity, and not at law, and is one peculiarly cognizable by the court, and should be tried by the court." The court sustained the motion, and rendered its decision upon the evidence and arguments adduced upon the trial. To these rulings and decisions the plaintiffs excepted, and assign the same as error. The appeal is from the judgment, and the questions involved must be determined from the judgment-roll.

The first question is as to the change of venue. The trial court intimated its intention to change the venue to Kootenai

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the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title remains in the United States. In furtherance of this policy it was enacted by section 9 of the act of February 27, 1865, chapter 64 (13 Stats. 441; Rev. Stats., sec. 910), that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession."

Section 2326 (Act Cong., May 10, 1872), Revised Statutes 427, among other provisions, says: "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim." We understand that an action to determine the right of possession as authorized by this act is in this territory an action at law. If so, the appellants were entitled to a jury, and the court erred in holding the cause was a suit in equity, and in denying the right to a jury trial. (*Killian v. Ebbinghaus*, 110 U. S. 573, 4 Sup. Ct. Rep. 235.) This view seems to have support in a subsequent statute upon this subject. The effect of the act of Congress of March 3, 1881, amendatory of original section 2326, was that the right of each party to the possession of the property should be tried and determined; and, if neither party established a right to the same, the jury should so find, and judgment should be rendered accordingly.

But it is contended that the form of action must be controlled by our territorial practice act. Section 476 of our Code of Civil Procedure reads: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." We see nothing in this statute which attempts to prescribe any particular form of action in the class of cases we have been considering, or that can be construed against the views herein expressed. We do not decide what would

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Opinion of the Court—Hays, C. J., Concurring.

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be the effect of this local statute in ordinary actions concerning real property, but only that it does not affect this cause. This is a special action, brought under a statute of the United States, and must be controlled by its provisions. (*Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, and 8 Pac. 622.)

We are of opinion that the trial court erred in holding that this was a cause in equity, and in denying to the plaintiffs a trial by jury. For this reason the judgment is reversed, and cause remanded to the court below for a new trial in conformity with this opinion. So ordered.

HAYS, C. J., Concurring.—I think the rights of the parties to this proceeding purely legal, dependent upon their legal *status*, such as citizenship, and their having complied with the requirements of the mining laws and regulations. When this has been shown, they have a legal right to demand a judgment of the court that they are entitled to the "right of possession" of the premises in controversy, or so much thereof as the facts warrant, and upon the proof of this judgment they will be entitled to their patent, upon compliance with the other requirements of section 2326 of the Revised Statutes of the United States. All that was necessary to allege in the pleadings herein were the ultimate facts that would have authorized the respective parties to have made the required proof, showing such citizenship, and compliance with the requirements of law. It is immaterial whether they are in or out of possession of the premises at the time of the bringing of the action, as it is not an equitable proceeding to remove a cloud from or to quiet the title to realty; nor is it an action at law simply to recover possession thereof. It is to determine the right of possession alone; for upon that the patent issues, when the requisite proof and payment are made. The pleadings in this case, I fear, were so redundant as to have confused the parties, and misled the court. The purpose of our code is to secure clearness, conciseness, and truthfulness in pleadings, and thereby accuracy in the issue. I commend its spirit to the consideration of counsel.

I concur in the opinion that the judgment of the court below should be reversed, and that a new trial should be granted.

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Opinion of the Court—Buck, J., Dissenting.

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BUCK, J., Dissenting.—This case comes up on an appeal from the judgment, and the record properly before the court consists, under section 653 of the Code of Civil Procedure, of a copy of the notice of appeal, of the judgment-roll, and bill of exceptions. There are in the transcript papers and documents not properly a part of the record, and, under the decision in *Graham v. Linehan*, 1 Idaho, 780, such documents, improperly inserted in the transcript, cannot be considered. Looking into the record, it appears that this case came on regularly for trial upon the issues therein on the seventeenth day of May, 1886, at the April term of the district court, in Shoshone county, first judicial district; that a jury was impaneled to try the issues of fact therein, and, having failed to agree, were discharged; that, after the discharge of the jury, the defendant moved the court to find the facts, and render a decree thereon, on the ground that it was a proceeding in equity; that the plaintiffs objected to the decision thereof, claiming that it was a cause for a jury; that, after hearing arguments thereon, the court filed its findings of fact, and rendered decree therein, against the objection of plaintiffs, who duly excepted thereto.

The real question upon the appeal is whether the court had the jurisdiction to decide the case. The jurisdiction of the court is determined by the character of the issues in the case.

In *Basey v. Gallagher*, 20 Wall. 680, Field, J., says: "But the consideration which the court will give to the questions raised by the pleadings when the case is called for hearing, whether it will submit them to a jury, or pass upon them without such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived; if equitable, the court is not bound to call a jury; and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The relief which equity affords must still be applied by the court itself."

This authority, coming from the supreme court of the United States, determines the law of the case upon this question. The jurisdiction, then, of the court to decide the case at bar depends upon the issues to be tried. These are determined by the pleadings—both complaint and the answer. Section 357 of our code



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Opinion of the Court—Buck, J., Dissenting.

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defines an issue to be a fact arising on the pleadings, maintained by one party, and controverted by the other. Section 359 defines an issue of fact to be a material allegation in the complaint controverted by the answer. An allegation not controverted is not an issue in the case. It is an admitted fact, to be considered as proven.

Looking, then, to the pleadings, we find the first allegation of the complaint to be as follows: "The plaintiffs complain, and for cause of action allege: 1. That on the seventh day of November, A. D. 1885, and long prior thereto, the plaintiffs were, and ever since have been, and now are, the owners, and in the possession, and entitled to the possession, of that certain quartz mine," etc., "called the 'Tiger lode,' " etc., describing the same by metes and bounds. The complaint is verified; and, under section 237 of our code, "if the complaint is verified, the denial of each allegation controverted must be specific." Section 259 provides that every material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true. Referring to the answer, the defendant denies as follows: "Deny that the plaintiffs now are, or ever have been, the owners of or entitled to the possession of the ground and premises described in the complaint." The allegation of plaintiffs, that plaintiffs are now in possession of said premises, is not controverted by defendants, and, by virtue of said section 259, for the purposes of this action, "must be taken as true."

The defendant has a right, in the conduct of his case, to rely upon its being taken as true, and I know of no power in the court to disregard this provision of the statute. In *Gay v. Winter*, 34 Cal. 160, Sanderson, J., in announcing the decision of the court, says: "Before entering upon the trial of an action it is of the utmost importance that all doubt, if such there be, as to the issues, should be removed. This is alike important to both parties and to the court. The plaintiff is entitled to an explicit denial of the material allegations of the complaint, or an admission of their truth, either by direct statement or by silence." In the case at bar the defendant remained silent as to plaintiffs' possession, and under the code said allegation is to be taken as true for the purposes of the action. Sanderson,

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Opinion of the Court—Buck, J., Dissenting.

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J., says: "It is quite as important for the defendant and the court as to the plaintiff that the issues should be settled in advance." I am unable to see how the court could disregard the rule of the code that plaintiffs' allegation was admitted and must be taken as true. See *Lillienthal v. Anderson*, 1 Idaho, 678, which is conclusive as to the admission.

The appellants claim that the pleadings set out an action in ejectment. I denominate the action to recover real property under the code ejectment, and the issue was out of law. But their allegation of possession of the premises described in the complaint, which under the code must be taken as true, precludes it from being ejectment. In *Kribbs v. Downing*, 25 Pa. St. 404, Black, J., says: "It is not without surprise that we find parties going back to the remote transactions of a former generation, and fishing up a lawsuit from an oblivion of fifty years. It is still stranger to see this done in the form of an ejectment for the whole of the original tract of land, when the plaintiffs are themselves in the actual possession of a part of it." Ejectment is a possessory action, and it cannot be maintained for land of which the plaintiff is himself in possession. If, then, the allegation of plaintiffs is taken as true, this cannot be ejectment.

It is claimed, however, that from a subsequent allegation in the complaint it appears that the plaintiffs are not in possession. (3 Wait's Actions and Defenses, 78.) The third allegation of complaint is as follows: "Plaintiffs allege that while the said plaintiffs were such owners, and so seised and possessed, and entitled to the possession, of said Tiger lode mining claim and premises, the said defendants did on the sixth day of November, 1885, without right or title, enter into and upon that said portion and part of the said Tiger lode mining claim last above mentioned and described, and oust and eject the plaintiffs therefrom; and ever since the said sixth day of November, 1885, have withheld, and still withhold, the possession thereof from the plaintiffs, to their damage in the sum of \$5,000."

This allegation is evidently intended to set up ouster by defendants. It is in the form prescribed for that purpose. It alleges that defendants ousted plaintiffs, and still withhold possession thereof from plaintiffs. It does not allege that defend-

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Opinion of the Court—Buck, J., Dissenting.

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ants are in possession, but that they withhold the possession from the plaintiffs. What constitutes the withholding of possession in the mind of the pleader does not appear. Possibly the filing a claim for patent is in his estimation the withholding of possession. It is such an allegation as allows the pleader to evade the requirements of the statute. It is not direct and positive, as is the allegation of possession in plaintiffs. If intended to be so, it is contradictory. At best, it makes the complaint ambiguous and unintelligible. In such pleading the adversary may demur, on the ground that the same is ambiguous, unintelligible, and uncertain; or, if he thinks he can answer it intelligently, he may do so, and, in the event of a conflict between his construction of it and the pleader's, the pleading will be construed against the pleader. (2 Wait's Practice, 334; *Landers v. Bolton*, 26 Cal. 418.)

In *Clark v. Dillon*, 97 N. Y. 373, the court says: "A construction [drawing] of doubtful or uncertain allegations in a pleading which enables a party, by thus pleading, to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly; and, when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader." (*Clark v. Jones*, 49 Cal. 618.)

In *Landers v. Bolton*, above cited, Sawyer, J., says: "The allegations of a pleading are to be taken most strongly against the pleader. The presumption is that he will state his case as strongly in his own favor as the facts will justify." (2 Wait's Practice, p. 334, sec. 1; *Bates v. Rosekrans*, 23 How. Pr. 102.)

In *Nation v. Cameron*, 2 Dak. 362, 11 N. W. 525, the court says that "ambiguities arising on the face of the pleadings are to be construed against the pleader."

In *Burke v. Water Co.*, 5 Morr. Min. Rep. 211, an action in ejectment, the court says: "The complaint charges that the defendant, the Table Mountain Water Company, was in possession. The answer of the company does not deny this averment. This admission is conclusive evidence of the fact admitted." In the case at bar the plaintiff alleges possession in himself, and the defendant does not deny it. Is not the admission equally conclusive? Can he deny possession upon the trial, against his own allegation in the complaint?

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Opinion of the Court—Buck, J., Dissenting.

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In *Butler v. Kaulback*, 8 Kan. 672, the court says: "Facts admitted by the pleadings cannot be disputed by the evidence, but must be taken as true for the purposes of the action. It is impossible that a thing be true and untrue at the same time."

In *Board v. Shaw*, 15 Kan. 34, the court says: "On the trial of a cause the whole pleadings are considered together; and, where two allegations of the same party are inconsistent with each other, the allegation most unfavorable to such party will be deemed to override the other allegation." To the same effect, *Natchez v. Minor*, 9 Smedes & M. 544, 48 Am. Dec. 731, and *Burrows v. Yount*, 6 Blackf. 458, 39 Am. Dec. 439.

The pleadings are not merely construed most strongly against the pleader by the courts, but it was the province of, and, indeed, it is necessary for, the defendant to construe the allegations of the complaint in making his answer. In *Clark v. Dillon*, above cited, the court says: "It is in the nature of things that a party who is required to frame his issues for the information of his adversary and the court must be responsible for any failure to express his meaning clearly and unmistakably. While it is competent for a party to move to make the pleadings of his adversary more definite and certain, yet, inasmuch as it is the primary duty of the party pleading to present a clear and unequivocal statement of his allegations, the onus of having them made so cannot be cast upon his adversary by his own fault in failing to perform his duty."

In the complaint in the action at bar there is a positive allegation of possession in the plaintiff of the premises in dispute and an equivocal allegation of possession in defendant, and ouster by defendant. The defendant, in answering, exercised his prerogative in the interpretation of the allegations in the complaint, admitted possession in plaintiffs, and denied ouster and possession in himself; and, under our code, possession in plaintiffs must be taken as true for the purposes of this action. The court, in determining the character of the action to be tried, must do so upon an inspection of the issues made by the pleadings. If it be true that an action of ejectment cannot be maintained by one in possession of the premises in controversy, it follows that the case at bar is not in the nature of an action in ejectment, and that the title to the disputed premises cannot be

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Opinion of the Court—Buck, J., Dissenting.

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determined by this action under the issues made in the pleadings, except it be considered an action to determine the adverse claim of defendants to the premises in dispute under section 476 of our code. "This action is brought under section 2326 of the United States Statutes, to determine the adverse claim of parties to the mining claim in dispute." Section 476 of our code provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Under such provision of the code, action may be brought by one in possession. This action is denominated an action to quiet title, and "is the converse of the legal action of ejectment." (Pomeroy's Remedies, 415.) In many states this action is confined to parties plaintiff in possession. Under our code the plaintiff may be either in or out of possession, and the adverse party must claim an interest adverse to the plaintiff. In *Curtis v. Sutter*, 15 Cal. 262, Field, J., says: "It enlarges the class of cases in which equitable relief could formerly be sought in quieting title." In Pomeroy's Equity Jurisprudence (volume 3, page 435, section 1399) the principle is stated that equity will exercise this jurisdiction where the estate or interest is legal, when the remedies at law are inadequate. In the case at bar, the plaintiff being in possession, the legal action of ejectment cannot be maintained, and the remedy at law is inadequate, unless all the rules of practice are to be subverted.

It is intimated that in order to apply section 2326 of the United States Statutes, it may be necessary to vary some of the established rules of practice. That section, however, requires that an adverse claimant must commence proceedings in a court of competent jurisdiction to determine the controversy between the adverse claimants. The claimant must commence proceedings according to the rules of practice of the court in which the action is brought. If the claimant is out of possession, and his adversary in possession, ejectment is the appropriate remedy. If he is in possession, his appropriate remedy is action to quiet title.

In *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 9 Nev. 240, the court says: "Congress did not, by section 2326, or by the acts of July 26, 1866, or July 9, 1870, confer any ad-

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Opinion of the Court—Buck, J., Dissenting.

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ditional jurisdiction on the state courts. The object of the law, as we understand it, was to require parties protesting the issuance of a patent to go into the state courts of competent jurisdiction, and institute such proceedings as they might, under the different forms of action therein allowed, elect, and try the right of possession. Said section does not prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they bring their action under section 256 of the Civil Practice Act, or, if they have been ousted from the possession, they should bring their action of ejectment. We are of the opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes, that apply to such actions in our courts."

This is a clear and comprehensive exposition of the statute as understood by one of the highest courts upon the Pacific coast. I know of no decision of the supreme court of the United States, or of the states or territories, which holds that a different practice should prevail.

If ejectment is not the appropriate remedy, and an action to quiet title is, the only question remaining is, To what jurisdiction does this action belong? Pomeroy, in his *Equity Jurisprudence* (volume 3, section 1393), says it belongs to the original general jurisdiction of equity. Of this there will be no controversy, unless, indeed, it is contended that there is something in section 2326 which changes this remedy from the equity to the law side of the court. It may be argued that this would deprive the parties of the benefit of a jury trial. This would be equally true of all equity cases. I see no reason in the nature of the questions involved which would not apply with equal force to an action of divorce, to reform a written contract on the ground of mutual mistake. The time may come when, under the law, all questions shall be submitted to a jury. At present the law is otherwise, and the court must apply the law to the issues made by the pleadings as it exists. If the issues made are equitable, then, under the authority of *Basey v. Gallagher*, 20 Wall. 680, a jury was discretionary with the court, and their findings but advisory only. Exercising its discretion, the court, upon the trial, submitted the issues to a jury. They

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Opinion of the Court—Buck, J., Dissenting.

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having failed to agree, the court, exercising its equitable powers, as is common and appropriate in such cases, found the facts in the case, and rendered a decree thereon. There was nothing exceptional in this action. Indeed, the procedure by action to quiet title is the usual one adopted under circumstances like those set forth in the pleadings in the case at bar. (*Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Pralus v. Mining Co.*, 35 Cal. 34; *City of San Diego v. Allison*, 46 Cal. 162; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894.) In *Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308, the court says: "If the plaintiff is in possession, it may be a question whether, indeed, equity does not afford the only remedy appropriate in this case."

Section 2326 has the same effect upon the parties claiming the mine that an order of interpleader does upon the parties affected thereby. (3 Estee's Pleading and Practice, 235, sec. 4529.) The United States holds the title to the premises in dispute, and is ready to transfer to either claimant entitled to receive it; and it directs, in this statute, that they commence an action within a given time to settle their respective claims thereto. This is in precise analogy to an order of interpleader in a court of equity. To this relief in equity there are four essential conditions given in Pomeroy's Equity Jurisprudence (section 1322), as follows: 1. The same thing must be claimed by all the parties. (The thing demanded in this controversy is the mining claim in dispute.) 2. All their adverse claims must be derived from a common source. (The adverse claimants in the case at bar claim from the United States.) 3. The person asking the relief must have a claim or interest in the controversy. (The United States has no interest other than to transfer the title to the one adjudged to be entitled to it.) 4. The party praying for interpleader must be indifferent between the parties—merely a stakeholder. (The United States is indifferent in this controversy.) Finally (section 1325), the stakeholder must have the thing in his possession, ready to deliver it upon a decree determining who is entitled to receive it. Section 2326 provides that the United States will deliver the patent to the one whom the judgment declares is entitled to it.

For these reasons, I dissent from the opinion of the court.

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*Opinion of Broderick, J., on Petition for Rehearing.*

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He brings his action to quiet title. If not in possession, his action is in ejectment. The plaintiff was nonsuited because the court held he had not proven possession in himself. The supreme court of the United States, in reviewing the case in a decision brought to the attention of this court, and much relied on, overrules the decision of nonsuit on the ground that the evidence established possession in plaintiff, but recognizes the propriety of the action as brought. I think no case has been cited upon the brief or in the arguments that holds that an action to quiet title is not the appropriate remedy by a party alleging possession.

ON PETITION FOR REHEARING.

BRODERICK, J.—Since announcing the opinion in this case, counsel for respondent have petitioned for a rehearing. In support of this application, numerous authorities have been cited, but very few of them throw any light on the question we have been considering. As on the hearing, much theorizing has been indulged in on the law of ejectment as it formerly existed and now exists; but we are still unable to see the application of these rules of law to the case at bar. The common-law form of ejectment, with all its fictions, has long since been almost entirely superseded by statutory enactments, so that now, in most of the states and territories, there is substituted an action to recover specific real property, or to recover the possession of real property, which are clearly legal actions. The action to recover real property implies that the defendant is in actual possession by himself or tenant; hence, when it appears upon the trial that the defendant was not in possession when the action was instituted, the plaintiff will be nonsuited. But that is not this case, and there is very little analogy between the two. This is an action to determine the right of possession; and it makes no difference, so far as the form of the action is concerned, who is in possession. We think this view is amply sustained by the authorities.

In *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 622, the supreme court of California, in considering a case brought under this act of Congress, says: "The action is not brought to recover possession of the property, or damages for trespass there-



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Opinion of Broderick, J., on Petition for Rehearing.

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on, or to quiet title thereto, but is a special action to determine the right of possession preliminary to the right to purchase from the United States." In *Steel v. Mining Co.*, 18 Nev. 87, 1 Pac. 448, Hawley, C. J., in considering the same question, says: "These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail." To the same effect is *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652.

Here are the latest adjudicated cases from the three great mining states of the Union, all agreeing that this is a special action, not to recover possession or to quiet title, but to determine who has the right of possession, or, in other words, to determine who is entitled to a patent to the disputed ground. This is the object of the action, and this object must not be lost sight of.

Section 2325 of the Revised Statutes provides how any person entitled to a patent to a mining claim may procure the same where there is no adverse claim. The applicant must show, by his verified application and other proofs, that he has complied with the law in locating, marking the boundaries, etc.; that he has performed the necessary labor, and has in all other respects observed the requirements of the law. After notice of the application has been duly given by the register of the land office, if no adverse claim has been filed, the applicant will be entitled to and will receive his patent. It will be observed, from an examination of the statute, that the applicant who claims under a location is not required to show actual possession of the claim in order to entitle him to a patent therefor. "Actual possession of a claim is not essential to the validity of the title obtained by a valid location." (*Belk v. Meagher*, 104 U. S. 279.)

When, during the period of publication, an adverse claim is filed, the proceedings in the land office are stayed, and the controversy is transferred to the court for the trial of the questions necessary to determine who is entitled to a patent. In the land office the controversy is between the applicant and the United States. When transferred to the court, the controversy

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Opinion of Broderick, J., on Petition for Rehearing.

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is between the several claimants and the United States; but the same questions are tried that would have been had the proceeding remained in the land office, except that the rights of an additional party or parties must be adjudicated in the court. But under the statute there is no issue as to the actual possession of the claim to be tried. It is not an issuable fact in the controversy; and, if it enters into the trial at all, it is only incidentally. It seems to us that any construction of the statute that would make the form of the action dependent on the question of actual possession would, in effect, interpolate into the statute a condition precedent to obtaining a patent to a mining claim which Congress has not seen fit to impose.

Clearly, then, the question to be tried in this case is: 1. As to the qualifications of the respective parties to hold such property by patent; and 2. The right to the possession of the disputed ground; and, if the jury find in favor of either, the general verdict should be, in substance, that such party has the right of possession to the ground. This strips the action of all fiction and technicality, and determines the facts which the commissioner of the general land office must know before a patent issues—namely, who, if anyone, is entitled to it. By the amendatory act of March 3, 1881, if, on the trial, neither party establishes a right of possession to the claim, or any part thereof, the jury is required to so find, and neither party will be entitled to a patent. This act indicates clearly that the general government is not a mere “stakeholder,” but that it has an interest in these controversies.

Counsel seem to place much reliance on *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 9 Nev. 248, and *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894. The former case was decided before the supplemental act of March 3, 1881, and has since been essentially modified in *Steel v. Mining Co.*, *supra*. The Montana case has been in effect overruled by the supreme court of the United States in *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289.

We are also referred to *Basey v. Gallagher*, 20 Wall. 680. The subject of the controversy in that case was a water ditch, or damages for a wrongful diversion of water, and we cannot see that it is authority in this case.

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Points decided.

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It is also contended that the words of the statute, "commence proceedings in a court of competent jurisdiction," etc., are significant. We think this means a court of general jurisdiction, whether federal, state, or territorial. In the territories the district courts are courts of original general jurisdiction, and in these courts a jury trial is allowed as a matter of right in all cases where it was allowed at the common law. This right is secured by the organic acts. (*Chambers v. Harrington*, 111 U. S. 351, 4 Sup. Ct. Rep. 428.)

It is unnecessary to pursue this subject further. We are still satisfied with the conclusions reached in our former opinion herein. Application for a rehearing denied.

Hays, C. J., concurring.

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(January 27, 1888.)

SEBREE ET AL. v. SMITH.

[16 Pac. 477.]

**RULES OF COURT—TIME TO FILE TRANSCRIPT.**—A transcript filed on Friday preceding Monday, the first day of the term of this court, is in time under the rules of the court.

**UNDERTAKING ON APPEAL—WHEN THERE ARE TWO APPEALS AND THE UNDERTAKING FAILS TO SPECIFY VOID FOR UNCERTAINTY.**—An undertaking on appeal under section 4809 of the Idaho code, intended to apply to several appeals in the same action, must specify each of such appeals, and will not be construed to apply to appeals not mentioned therein.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County.

Kingsbury & McGowan, for Appellants.

No authorities cited upon the point which the court decides.

A. F. Montandon, for Respondent.

No brief filed in case.

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Opinion of the Court—Buck, J.

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BUCK, J.—The respondent filed his motion to dismiss the appeal on two grounds, to wit: 1. Because the transcript was not filed in time; and 2. From the order overruling the motion for a new trial, because there was no undertaking filed on said appeal. The transcript was filed in this court on the sixth day of January, 1888. The first day of this term was the ninth day of January. Rule 2 provides that, in an appeal perfected thirty days before the commencement of the next regular term or adjourned term of this court, the transcript shall be filed at least three days before the first day of said term. Rule 3 provides that if the transcript of the record is not filed within the time prescribed by rule 2 the appeal may be dismissed on motion, without notice, on Monday during the week in which the cause is subject to call under rule 8. Section 8 of our code provides that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." We think this provision should control, and that the transcript was filed in time. The motion to dismiss the appeal on that ground is therefore overruled.

The motion to dismiss the appeal from the order overruling a motion for a new trial is based upon the alleged failure of appellant to file the necessary undertaking. There are two notices of appeal—one from the judgment, and one from the order overruling the motion for a new trial—and two undertakings on file in this case. The language of the undertakings is: "Whereas, the plaintiffs in the above-entitled action appeal to the supreme court of Idaho territory from the judgment made and entered against them on the twenty-fifth day of June, 1887: Now, therefore, in consideration of the premises and of such appeal we, Chas. G. Burnside and Chas. P. Doane, do jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal." The language of the two undertakings is identical as far as quoted, and they were signed by the same sureties, and filed on the same day. No reference, in terms or otherwise, is made in either of these undertakings to an appeal from the order overruling the motion for a new trial. It is claimed, however, that under our

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Points decided.

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code these undertakings an appeal from the judgment are sufficient to sustain the appeal from the order overruling the motion for a new trial. Section 4809 provides "that when more than one appeal in the same action, whether from the judgment and an appealable order or orders, or from two or more appealable orders, are taken at the same time, but one such undertaking or deposit for damages and costs need be filed or made." While this provision would undoubtedly allow one undertaking to be so drawn as to be sufficient for several appeals in the same action, we think the language should designate that the undertaking is given in all such several appeals. The language in these undertakings refers to the appeal from the judgment alone, and specifies that it is given in consideration of such appeal. We think that the sureties would not be liable for damages or costs on any appeal not specified in the undertaking. We are therefore of the opinion that there is no undertaking on the appeal from the order overruling the motion for a new trial, and said appeal is hereby dismissed. (Hayne on New Trial and Appeal, sec. 211; *Horn v. Water Co.*, 18 Cal. 142; *Bornheimer v. Baldwin*, 38 Cal. 671; *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. 187; *Chester v. Association*, 64 Cal. 42, 27 Pac. 1104.)

Hays, C. J., and Broderick, J., concurring.

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(February 25, 1888.)

SEBREE ET AL. v. SMITH.

[16 Pac. 915.]

**EVIDENCE.**—Offers of settlement of a suit not accepted are not admissible against the party making them on the trial of the action.

**EXCEPTIONS—SETTLEMENT OF, BY JUDGE AFTER TRIAL.**—An agreement of parties to an action on trial, appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial.

**PLEADINGS—SECTION 4841 CONSTRUED.**—Under section 4841 the district court may allow amendments to the pleadings in an action appealed from the justice or probate court.

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Argument for Respondent.

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**ORAL STIPULATIONS OF ATTORNEYS—COURT WILL NOT CONSIDER UNLESS IN OPEN COURT.**—The court will not attempt to determine the nature or effect of disputed oral stipulations of litigants or attorneys affecting the rights of parties or the conduct of the trial, and it will not enforce such stipulations unless the attorneys agree in open court as to what they are, nor will they be considered on appeal, unless they are made a part of the record.

**CLAIM AND DELIVERY—DAMAGES FOR USE OF—MEASURE OF DAMAGES.**—In an action of claim and delivery, where the property sought to be recovered is valuable for use aside from its intrinsic value, and the prevailing party claimed damages for the loss of its use in his pleadings, the measure of damages is the value thereof and the reasonable value of its use during its detention. In determining value of its use, the taxes which the prevailing party would have paid had he retained possession thereof and the usual and ordinary risk incident to the possession thereof should be considered.

**ATTORNEYS AS WITNESSES FOR CLIENT.**—Attorneys should offer themselves as witnesses for their clients only in case of extreme necessity.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County.

Kingsbury & McGowan, for Appellants.

Any implied admission of liability in an offer to settle a suit cannot be given in evidence against the party making the offer. (*Marsh v. Gold*, 2 Pick. 290; *Laurence v. Hopkins*, 13 Johns. 288; *Rideout v. Newton*, 17 N. H. 71; *Perkins v. Railroad Co.*, 44 N. H. 223; *Gerrish v. Sweetser*, 4 Pick. 374; *Batchelder v. Batchelder*, 2 Allen, 105; *Saunders v. McCarthy*, 8 Allen, 42; *Harrington v. Lincoln*, 4 Gray, 563, 64 Am. Dec. 95; *Gay v. Bates*, 99 Mass. 263; *Durgin v. Somers*, 117 Mass. 55.) Even where the offer is made under the statute, and admits as a fact there is an amount due, it cannot be given in evidence. (Code, secs. 606, 678.)

A. F. Montandon, for Respondent.

For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby. (Code Civ. Proc., sec. 4453; *Sedgwick on Damages*, 4th ed., p. 88, and note; *Boyle v. Case*, 18 Fed. 800.) The value is the proper rule in

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the case in hand. (*Butler v. Mehrling*, 15 Ill. 488; *Kenyon v. Goodall*, 3 Cal. 257; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Williams v. Phelps*, 16 Wis. 80; *Crabtree v. Clapman*, 67 Me. 326; *Elder v. Frevert*, 18 Nev. 446, 5 Pac. 69.) When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other. (*Lanfear v. Sumner*, 17 Mass. 110, 9 Am. Dec. 119, and note; *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 346.)

BUCK, J.—Action of replevin brought to recover two mules. Originally there were two actions, one for each mule, but they were consolidated on the trial by the consent of parties. The action was commenced in the probate court of Alturas county, and thence taken by appeal to the district court. It was tried in the district court, at the June term thereof, 1887, and judgment rendered for the defendant. Motion for a new trial was made and overruled, and an appeal taken to this court from the judgment and from the order overruling the motion for a new trial. The appeal from the order overruling the motion for a new trial was dismissed, on the ground that no undertaking had been filed as required by statute, and the cause now to be considered is on the appeal from the judgment alone.

In the district court the defendant was allowed to amend his answer on terms, under objection by the plaintiffs, to which ruling the plaintiffs excepted, and which they have specified as error. Section 4841 of the Code of Civil Procedure, provides that the district court has the same power to grant amendments on appeal from probate and justices' courts that it does in suits commenced in the district court. It is also claimed that said amendment was contrary to the stipulation of parties when the consolidation of the two actions was made; and affidavits are sent up in the transcript to prove such stipulation. No stipulation of the kind appears in the record of the case, and this court cannot go outside of the record to consider affidavits to prove oral stipulations of the parties. Such stipulations when made should be entered of record, or reduced to writing and filed with the other papers in the case. The amendment was within the discretion of the court, and properly allowed.

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The appellants specify as error the refusal of the court to strike out the evidence of A. F. Montandon, attorney for defendant, who was sworn as a witness on behalf of his client. The evidence objected to is as follows: "Mr. Holt came to my office, and offered to return the mules to Smith, if he wanted to dismiss the suit." This evidence was given by the witness without any warning of its character, and the attorney for plaintiffs had no opportunity to object to it before it was given. He immediately moved that it be stricken out as "testimony showing an offer of settlement," which motion was overruled, and exception noted. The overruling of the motion to strike this evidence out is assigned as error. In the case of *Connolly v. Straw*, 53 Wis. 648, 11 N. W. 17, referring to the practice of attorneys appearing as witnesses in behalf of their clients, the court says: "As a general rule, no doubt, attorneys should not be witnesses for their clients. The sentiment of the profession is against it, and for very satisfactory reasons; yet cases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. In such a case it would be a vicious professional sentiment which would deprive the client of the benefit of his attorney's testimony. The attorney will decide for himself whether he ought to become a witness. If he resolves the question in the affirmative, a nice sense of professional propriety will no doubt prompt him, as did the attorney in the present case—that is, to surrender the management of the case to others. Of course, an attorney should not accept a retainer if he knows in advance that he will be a material witness for the party seeking to employ him. But a breach of professional ethics in this respect does not necessarily involve moral turpitude, or affect the credibility of the attorney who becomes a witness for his client. In such a case the jury may consider the relation of the witness to the parties in determining the weight which should be given to the testimony." In *Alger v. Merritt*, 16 Iowa, 121, the court says: "No attorney having a just conception of his true and proper position will willingly unite the character of a counsel and a witness in the same case, for experience has shown that those who on repeated occasions allow themselves to be thus used are certain to feel most keenly the consequences of their



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indiscretion. Some courts have excluded such testimony entirely, because public policy and the integrity and welfare of the profession dictate that no one should be at the same time both advocate and witness for his client. Such testimony is not excluded in this state; but if a party is really taken by surprise, we would not deny him a new trial because of his failure to throw his attorney into the witness-box, to, if possible, save himself from the consequences of such surprise." The above extracts indicate the jealous care with which courts guard the interests of litigants and the ethics of the profession. They indicate clearly that courts will more readily grant new trials or other relief when the cause of complaint has its foundation in the indiscretions of the attorneys practicing under license of the court, and whose honesty and sense of honor the court guarantees in granting licenses to practice. The practice of an attorney giving evidence on behalf of his client should be indulged in, only in cases of urgent necessity, and when he does so he should give his evidence with absolute fairness. If he has no associate counsel, and makes his statement without questions, the opposing attorney is unable to protect his client from the effect of improper statements made within the hearing of the jury. Striking out such evidence cannot efface it from the memory of the jurors. The evidence given in this case seems inadmissible under the established rules of practice, and ought to have been stricken out. (1 Greenleaf on Evidence, sec. 192; *Barker v. Bushnell*, 75 Ill. 220; *Rideout v. Newton*, 17 N. H. 71; *Williams v. Thorp*, 8 Cow. 201; *Marvin v. Richmond*, 3 Denio, 58; *Home Ins. Co. v. Warehouse Co.*, 93 U. S. 546.)

The respondent objects to the consideration of the errors of law claimed to have been committed on this trial, for the reason that the exceptions thereto were not settled at the time that they were taken. Section 4426 of our Code of Civil Procedure enacts that, except as to such decisions as are deemed excepted to under section 4427 of the code, "the exceptions must be taken and settled at the time the decision is made, and no order of court shall be made for the settlement of such exceptions at any other time, except by the agreement of parties." The record shows a stipulation of the parties made on the trial, and entered in the record, whereby it was agreed that such excep-

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He brings his action to quiet title. If not in possession, his action is in ejectment. The plaintiff was nonsuited because the court held he had not proven possession in himself. The supreme court of the United States, in reviewing the case in a decision brought to the attention of this court, and much relied on, overrules the decision of nonsuit on the ground that the evidence established possession in plaintiff, but recognizes the propriety of the action as brought. I think no case has been cited upon the brief or in the arguments that holds that an action to quiet title is not the appropriate remedy by a party alleging possession.

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ON PETITION FOR REHEARING.

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BRODERICK, J.—Since announcing the opinion in this case, counsel for respondent have petitioned for a rehearing. In support of this application, numerous authorities have been cited, but very few of them throw any light on the question we have been considering. As on the hearing, much theorizing has been indulged in on the law of ejectment as it formerly existed and now exists; but we are still unable to see the application of these rules of law to the case at bar. The common-law form of ejectment, with all its fictions, has long since been almost entirely superseded by statutory enactments, so that now, in most of the states and territories, there is substituted an action to recover specific real property, or to recover the possession of real property, which are clearly legal actions. The action to recover real property implies that the defendant is in actual possession by himself or tenant; hence, when it appears upon the trial that the defendant was not in possession when the action was instituted, the plaintiff will be nonsuited. But that is not this case, and there is very little analogy between the two. This is an action to determine the right of possession; and it makes no difference, so far as the form of the action is concerned, who is in possession. We think this view is amply sustained by the authorities.

In *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 622, the supreme court of California, in considering a case brought under this act of Congress, says: "The action is not brought to recover possession of the property, or damages for trespass there-

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on, or to quiet title thereto, but is a special action to determine the right of possession preliminary to the right to purchase from the United States." In *Steel v. Mining Co.*, 18 Nev. 87, 1 Pac. 448, Hawley, C. J., in considering the same question, says: "These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail." To the same effect is *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652.

Here are the latest adjudicated cases from the three great mining states of the Union, all agreeing that this is a special action, not to recover possession or to quiet title, but to determine who has the right of possession, or, in other words, to determine who is entitled to a patent to the disputed ground. This is the object of the action, and this object must not be lost sight of.

Section 2325 of the Revised Statutes provides how any person entitled to a patent to a mining claim may procure the same where there is no adverse claim. The applicant must show, by his verified application and other proofs, that he has complied with the law in locating, marking the boundaries, etc.; that he has performed the necessary labor, and has in all other respects observed the requirements of the law. After notice of the application has been duly given by the register of the land office, if no adverse claim has been filed, the applicant will be entitled to and will receive his patent. It will be observed, from an examination of the statute, that the applicant who claims under a location is not required to show actual possession of the claim in order to entitle him to a patent therefor. "Actual possession of a claim is not essential to the validity of the title obtained by a valid location." (*Belk v. Meagher*, 104 U. S. 279.)

When, during the period of publication, an adverse claim is filed, the proceedings in the land office are stayed, and the controversy is transferred to the court for the trial of the questions necessary to determine who is entitled to a patent. In the land office the controversy is between the applicant and the United States. When transferred to the court, the controversy

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is between the several claimants and the United States; but the same questions are tried that would have been had the proceeding remained in the land office, except that the rights of an additional party or parties must be adjudicated in the court. But under the statute there is no issue as to the actual possession of the claim to be tried. It is not an issuable fact in the controversy; and, if it enters into the trial at all, it is only incidentally. It seems to us that any construction of the statute that would make the form of the action dependent on the question of actual possession would, in effect, interpolate into the statute a condition precedent to obtaining a patent to a mining claim which Congress has not seen fit to impose.

Clearly, then, the question to be tried in this case is: 1. As to the qualifications of the respective parties to hold such property by patent; and 2. The right to the possession of the disputed ground; and, if the jury find in favor of either, the general verdict should be, in substance, that such party has the right of possession to the ground. This strips the action of all fiction and technicality, and determines the facts which the commissioner of the general land office must know before a patent issues—namely, who, if anyone, is entitled to it. By the amendatory act of March 3, 1881, if, on the trial, neither party establishes a right of possession to the claim, or any part thereof, the jury is required to so find, and neither party will be entitled to a patent. This act indicates clearly that the general government is not a mere “stakeholder,” but that it has an interest in these controversies.

Counsel seem to place much reliance on *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 9 Nev. 248, and *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894. The former case was decided before the supplemental act of March 3, 1881, and has since been essentially modified in *Steel v. Mining Co.*, *supra*. The Montana case has been in effect overruled by the supreme court of the United States in *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289.

We are also referred to *Basey v. Gallagher*, 20 Wall. 680. The subject of the controversy in that case was a water ditch, or damages for a wrongful diversion of water, and we cannot see that it is authority in this case.

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Points decided.

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It is also contended that the words of the statute, "commence proceedings in a court of competent jurisdiction," etc., are significant. We think this means a court of general jurisdiction, whether federal, state, or territorial. In the territories the district courts are courts of original general jurisdiction, and in these courts a jury trial is allowed as a matter of right in all cases where it was allowed at the common law. This right is secured by the organic acts. (*Chambers v. Harrington*, 111 U. S. 351, 4 Sup. Ct. Rep. 428.)

It is unnecessary to pursue this subject further. We are still satisfied with the conclusions reached in our former opinion herein. Application for a rehearing denied.

Hays, C. J., concurring.

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(January 27, 1888.)

## SEBREE ET AL. v. SMITH.

[16 Pac. 477.]

**RULES OF COURT—TIME TO FILE TRANSCRIPT.**—A transcript filed on Friday preceding Monday, the first day of the term of this court, is in time under the rules of the court.

**UNDERTAKING ON APPEAL—WHEN THERE ARE TWO APPEALS AND THE UNDERTAKING FAILS TO SPECIFY VOID FOR UNCERTAINTY.**—An undertaking on appeal under section 4809 of the Idaho code, intended to apply to several appeals in the same action, must specify each of such appeals, and will not be construed to apply to appeals not mentioned therein.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County.

Kingsbury & McGowan, for Appellants.

No authorities cited upon the point which the court decides.

A. F. Montandon, for Respondent.

No brief filed in case.

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Argument for Respondent.

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Wood & Wilson and Richard Z. Johnson, for Respondent.

A promise to pay for services may only be implied by the courts when they were rendered under such circumstances as authorized the party performing to entertain a reasonable expectation of payment by the party soliciting performance. (*Davidson v. Gaslight Co.*, 99 N. Y. 559, 566, 567, 2 N. E. 892; *Pew v. Bank*, 130 Mass. 391, 395; *Sawyer v. Bank*, 6 Allen, 209; *Crane v. Baudouine*, 55 N. Y. 256, 260; *Potter v. Carpenter*, 76 N. Y. 157, 159.) Appellant could not set up as a counterclaim a demand against respondent and another jointly. (*Howard v. Shores*, 20 Cal. 281; *King v. Wise*, 43 Cal. 635; *Waterman on Setoff*, secs. 200, 383.) The right of the parties, in the absence of any statute to the contrary, to contract for the payment of a reasonable attorney's fee by the debtor, in case his creditor is put to the expense of collecting his debt by law, rests upon the same ground as the right to make any other contract not prohibited by law, or *contra bonos mores*. (*Wilson Sewing-machine Co. v. Moreno*, 6 Saw. 25, 40, 7 Fed. 806, Fed. Cas. No. 17,853a, and cases cited; *Bank v. Ellis*, 6 Saw. 97, 100, 2 Fed. 44, Fed. Cas. No. 859.) When a promissory note, payable at a future time, provides for the payment of interest at certain times, and contains a clause that, if default be made in the payment of the interest at such time, then the note shall immediately become due, at the option of the holder, a failure to pay the interest makes the whole amount of the note due absolutely, at the option of the holder, if he so elect, without any notice from the holder to the payors. In such case the holder has no duty to perform to the payor, and the latter has no excuse to delay payment. (*Whitcher v. Webb*, 44 Cal. 127, 130.) Any decisive act of the party, with knowledge of his rights and of the facts, determines his election, in the case of conflicting and inconsistent remedies. (*Washburn v. Insurance Co.*, 114 Mass 176; *Connihan v. Thompson*, 111 Mass. 272.)

BUCK, J.—This was an action to foreclose a mortgage tried at the April term, 1887, in Ada county, and brought into this court on an appeal from the judgment.

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The appellants assign thirteen errors, but group them in their brief, and rely upon five, to wit: 1. Error in overruling a general demurrer to the complaint; 2. Error in overruling a special demurrer to complaint; 3. Error in finding the note and mortgage sued on were valid; 4. Error in not finding upon all the material issues raised by the findings; 5. Error in the findings of fact, in that they are not supported by the evidence, and are too general.

The first error assigned, to wit, error in overruling defendants' general demurrer to the complaint, is based upon two propositions: 1. That the complaint contains no allegation of the failure of the defendant to pay the interest due on the mortgage, or any installment thereof, or that the mortgagee had elected to consider the whole sum due; 2. That the complaint contained no allegation that the mortgagee had given notice to the mortgagor that he elected to consider the whole amount secured by the mortgage due. That portion of the complaint alleging a breach in the conditions of the mortgage is as follows: "That eight thousand dollars, the principal sum mentioned in said promissory note and mortgage, together with interest thereon at the rate of one and one-fourth per cent per month from said eleventh day of March, 1885, still remains unpaid, in whole and in part, from said defendants to this plaintiff, and the same is now due and payable." The condition in the mortgage is in the following words: "But in case default be made in the payment of the said principal or interest, or any installment of interest, as provided, then the whole sum of principal and interest shall be due, at the option of the said party of the second part, and suit may be immediately brought, and a decree be had to sell said premises," etc. While the statement of the breach in the complaint is not so exact and clear as the highest art in pleading might prescribe, yet its fault, if any, seems to be that it is not sufficiently definite. This defect does not, however, go to the substance of the pleading, and is not sufficient to sustain a general demurrer.

The second proposition of the appellants that the mortgagee cannot commence his action to foreclose until he has given the mortgagor notice that he has exercised the option specified

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in the conditions of the mortgage, and that he had elected to consider the entire sum secured by the mortgage due, and that the complaint must allege such notice, is elaborately considered in the briefs. It seems clear that in Wisconsin it is a rule of practice established by repeated adjudications that the complaint must allege that the mortgagee has elected to consider the whole amount due, and that he has notified the mortgagor of such election. (*Basse v. Gallegger*, 7 Wis. 442, 76 Am. Dec. 225; *Marine Bank v. International Bank*, 9 Wis. 57; *Rosseel v. Jarvis*, 15 Wis. 571.) We are unable to find that this rule of practice extends beyond the state of Wisconsin. "In *Whitcher v. Webb*, 44 Cal. 130, it is held that the mortgagor was not entitled to notice, in advance of commencing the action; that if he failed to pay the interest, that the mortgagee would insist upon his right to the whole debt. He was bound to know that that consequence would follow." In *Dean v. Applegarth*, 65 Cal. 391, 4 Pac. 375, the same doctrine is enunciated. In *Hunt v. Keech*, 3 Abb. Pr. 204, the court holds that the commencement of the suit to foreclose is a sufficient notice of the determination that the mortgagee intends to treat the whole sum as due *Noyes v. Clark*, 32 Am. Dec. 623, note, and *Cardiff v. Brokow*, 7 Ill. App. 647, are to the same effect. In *Trust Co. v. Munson*, 60 Ill. 371, the court says, where like provisions were in a deed of trust: "The deed of trust did not require any notice to be given to the debtor himself of the exercise of the option to make the whole indebtedness due. The maker of the deed knew that such a contingency was liable to occur at any time during a default of payment. If he wished personal notice of it to himself to be a condition precedent to the exercise of the power of sale, he should have so provided in his deed. To add to the power such a condition by implication might wrongfully disappoint the expectations of the creditor. To require a personal notice to the debtor, who, at the time, might be in distant or unknown parts, might create a very inconvenient delay in the collection of a claim evidently intended by the party to be speedy, and the creditor might well have refused a security trammelled by such a condition." These observations commend themselves to the court as being reasonable and equitable. In the case at bar the pro-



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vision is that the principal and interest shall be due at the option of the mortgagee, and suit may be immediately brought. We think, upon principle and upon authority, notice to the mortgagor of the election of the mortgagee to consider the whole sum due is not a condition precedent to the commencing of the action to foreclose, and that it is not necessary to allege such notice in the complaint.

The second alleged error in appellants' brief is the ruling of the court in overruling the special demurrer of the defendants, that the complaint does not state sufficient facts to entitle the plaintiff to attorney's fees. The allegation in the complaint referring to attorney's fees is as follows: "That ten per cent upon the amount found due upon said note and mortgage, as provided for in said mortgage, is no more than a reasonable counsel fee in this action for the foreclosure of said mortgage." The provision of the mortgage is that, out of the money arising from the sale and foreclosure, counsel fees, at the rate of ten per cent upon the amount which may be found due for principal and interest, may be retained by the mortgagee. The language of the special demurrer is "that facts sufficient to entitle plaintiff to an attorney fee are not stated." The finding of fact upon this item was "that ten per cent upon the amount due upon said note and mortgage, as stipulated and provided for in said mortgage, is a reasonable counsel fee for the foreclosure of said mortgage." The appellants claim in their brief that no evidence was introduced upon the value of counsel fees, and that under the pleadings and evidence the plaintiff is not entitled to attorney's fees. The complaint distinctly alleges that said attorney's fee is no more than is reasonable. The answer responds to this allegation with a denial "that, at the time of the commencement of this action, the plaintiff had either paid or become liable for any attorney's fees whatever in this action." There is no denial of the value of the attorney fee, alleged in the complaint, and its value is therefore admitted as alleged. This admission is sufficient to sustain the finding of the court.

We recognize the correctness of the interpretation of the stipulation for attorney's fees usual in mortgages as given by Judge Deady in *Burns v. Scoggin*, 16 Fed. 737, quoted by appellants: "That the true intent and purpose of the provision

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for such fee is the holding the plaintiff harmless from cost and expense of a suit to foreclose." In *Sewing-machine Co. v. Moreno*, 6 Saw. 35, 7 Fed. 806, the court says: "When the fee is so large as to suggest that it is a mere device to secure illegal interest, or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought probably, on slight additional evidence to that effect, to refuse to allow it, or reduce it to a reasonable sum. It would be better if these stipulations were not made for a fixed sum or percentage. In this way regard might be had to the nature and value of the services actually rendered by the attorney." In *Griswold v. Taylor*, 8 Minn. 342 (Gill. 301), the court quotes from *Tallman v. Truesdall*, 3 Wis. 443, with approval, to wit: "In regard to the stipulation for solicitor's fees in case of foreclosure, whenever it is resorted to as a cover for a greater rate of interest than is allowed by law, it then violates the contract; but when stipulated in good faith, as an indemnity for the necessary expenses of foreclosure, and is reasonable in amount, we see no objection to its incorporation in the contract, or its enforcement."

These decisions sufficiently indicate the correct principle upon which stipulations for attorneys' fees should be sustained and enforced. Equity dictates that attorneys' fees in actions to foreclose a mortgage should be reasonable, and that the amount allowed the plaintiff therefor should be limited to the amount actually paid for the services rendered. The practice of charging, as attorneys' fees, ten or fifteen per cent against the mortgagor, when a much smaller amount is actually paid to the attorney by the plaintiff, thus wrongfully increasing the burden of the debtor who seeks to redeem, is discreditable to the profession and contrary to every principle of equity. The courts should not sustain such a fraudulent and iniquitous practice. In such suits no fee should be allowed as reasonable which is to be divided with the plaintiff to increase the amount over that stipulated for in the mortgage.

In the case at bar the defendants, having appeared, admit that the amount stipulated for is reasonable, and on this appeal seek to avoid the same, not because it is unreasonable, but because stipulations therefor are contrary to public policy, and void. In considering this question, a clear distinction

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must be made between such a stipulation in a promissory note and a like agreement in a mortgage. While it is apparent that an adjudication sustaining such an agreement in a note would be authority for sustaining a like stipulation in a mortgage, it does not follow that adjudications sustaining an agreement for attorney's fees in a mortgage would sustain a like agreement in a promissory note. We now consider agreements of that character in mortgages, the question involved in the suit at bar. The decisions which sustain such agreements, as far as we have been able to find and classify them, are: *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Spalding v. Bank*, 12 Ohio, 544; *Martin v. Bank*, 13 Ohio, 250; *Thomasson v. Townsend*, 10 Bush, 114; *Van Marter v. McMillan*, 39 Mich. 305; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. 91. These decisions establish the doctrine that in Kentucky, Ohio, and Michigan such stipulations are void as against public policy. Opposed to these adjudications, and holding such stipulations valid either in a note or mortgage, are: *Cox v. Smith*, 1 Nev. 133; *Sperry v. Horr*, 32 Iowa, 184; *Wood v. North*, 84 Pa. St. 410; *Johnston v. Speer*, 92 Pa. St. 227, 37 Am. Rep. 675; *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; 71 Mo. 627; *Jones v. Radatz*, 27 Minn. 240, 6 N. W. 800; *Griswold v. Taylor*, 7 Minn. 342 (Gill 301); *Morgan v. Edwards*, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21; *Dietrick v. Bayhi*, 23 La. Ann. 767; *Seaton v. Scoville*, 18 Kan. 435, 26 Am. Rep. 779; *Bank v. Rasmussen*, 1 Dak. 60, 46 N. W. 574; *Howestein v. Barnes*, 5 Dill. 482, Fed. Cas. No. 6786; *Wilson etc. Machine Co. v. Moreno*, 7 Fed. 806, 6 Saw. 35, Fed. Cas. No. 17,853a; *Weatherly v. Smith*, 30 Iowa, 131, 6 Am. Rep. 663; *Clawson v. Munson*, 55 Ill. 394; 1 Jones on Mortgages, secs. 359, 635; 1 Daniel on Negotiable Instruments, sec. 62, and note. The weight of authority is clearly in favor of sustaining a stipulation in mortgages for an attorney fee.

The appellants make the point also in their brief that a stipulation in a mortgage allowing counsel fees for a foreclosure does not entitle the plaintiff to attorneys' fees, unless he has paid them, or become liable for them, and that the complaint contains no such allegation. We have already intimated that attorneys' fees allowed in a foreclosure should be

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reasonable, and that no such fee is reasonable unless the attorney receive it, and have the full benefit of it; and we think it to be the duty of a court granting a decree of foreclosure, whenever the fee is contested, and in all cases of default, to limit the amount of such fee to that actually paid, or to be paid, and in all cases to allow no more than is reasonable. It is therefore necessary to allege in the complaint that such fee is to be paid to the attorney, and that it is a reasonable one. If the fee is to be reasonable, its amount will depend upon the nature of the case, and the labor required in its prosecution. If we adopt a rule of practice that the amount of the fee must be alleged, we necessarily hold that the amount of such fee must be determined arbitrarily, before the action is commenced. It is often difficult, and sometimes impossible, to determine the value of a service before it is performed. This is especially the case in actions which may continue for years, and be finally determined only in the supreme court of the United States.

It may be observed that the theory upon which stipulations in mortgages are sustained is that they provide for expenses incurred by the plaintiff in foreclosure for the services of an attorney. If there is no attorney, such expense is not incurred. If there is an attorney, the plaintiff's expense is limited to the amount paid therefor, provided it is reasonable. If this is correct, it follows that the fact of payment or assumed liability is simply one element in the proof which is offered to establish the reasonableness of the allowance for the fee sought to be recovered. It is evidence offered to establish a substantive fact, and as such need not be set out in the pleadings. In this case it is admitted that the fee charged is reasonable, and we think this admission sustains the finding of the court; as under our code, section 4217, it is expressly provided "that every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true."

The appellants claim also that the attorney fee is but usury in disguise, and ought not to be allowed. In *Lloyd v. Scott*, 4 Pet. 225, Justice McLean says: "Where a party agrees to pay a specified sum, exceeding lawful interest, provided he do not pay the principal by a day certain, it is not usury." This doctrine is adopted in *Cutler v. How*, 8 Mass. 257; *Tuttle v. Clark*,

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4 Conn. 153; *Pollard v. Bayers*, 6 Munf. 433; *Jones v. Hubbard*, 6 Cal. 211; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Shuck v. Wight*, 1 G. Greene, 128; *Fisher v. Anderson*, 25 Iowa, 28; 95 Am. Dec. 761; *Rogers v. Sample*, 33 Miss. 360, 69 Am. Dec. 351; *Gambril v. Doe*, 8 Blackf. 140, 44 Am. Dec. 760; *Billingsley v. Dean*, 11 Ind. 331; *Lawrence v. Cowles*, 13 Ill. 577; *Sumner v. People*, 29 N. Y. 337; *Bank v. Curtiss*, 19 Johns. 326; *Tyler on Usury*, 210.

The appellants urge that the court erred in not finding upon all the material issues made by the pleadings. In the answer of the defendants they set up, by way of counterclaim, in separate allegations, two items of account—one for money laid out and expended for plaintiff's use and benefit in the sum of forty-four dollars; and the other for professional services rendered for plaintiff between the fifteenth day of December, 1882, and the first day of August, 1885, in the sum of \$7,360. There are two findings of fact responsive to these allegations, to wit: 1. That the defendants had not expended the sum of forty-four dollars, or any other sum; and 2. That the defendants had performed professional services between the dates named for plaintiff, but that they had been wholly paid for the same.

The appellants claim that there is no finding as to the value of services rendered for plaintiff in procuring the right of way for the Boise branch of the Oregon Short Line Railroad, or that said services were performed at plaintiff's request, or paid for by plaintiff. These items come into the case upon the testimony of witnesses, and not by allegation in the pleadings. They are a part of the evidence, under the general allegation of service, and the finding upon the general allegation is conclusive as to each item of evidence offered to sustain it.

It is claimed also by appellants that the ninth finding of fact is too general. It is as follows: "That all the allegations in the plaintiff's complaint are true." While a general finding of this kind is very unsatisfactory, and justly criticised as being too indefinite, yet it is sustained by repeated adjudications in California; and, under the evidence submitted in the transcript, we are of opinion that it should not be disturbed.

The last point in appellant's brief is that the findings are not supported by the evidence. A careful examination of the evidence establishes certain facts, to wit: It appears from defend-

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Argument for Plaintiff in Error.

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ants' evidence that the services for which they claim a setoff were performed prior to July 1, 1884; that on July 11, 1884, they receipted to the plaintiff for \$125, in full of all accounts to date; that the receipt was in the handwriting of the defendant, Jeremiah Brumback. In the evidence of said defendant, on page 89 of the Transcript, he says: "I do not recollect; but, if I gave a receipt in full, that would be a settlement of what the receipt covers." And on page 90 he says: "If I gave a receipt in full, I presume it would cover just what the receipt covers—whatever the language covers." While a receipt may be disputed, and a mistake, if one exists, be corrected in the case at bar, this evidence seems to be corroborated by the defendant's testimony, and supports the findings in the case.

We find no error, and the judgment of the court below is affirmed.

Hays, C. J., and Broderick, J., concurring.

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(February 2, 1888.)

HART, PROBATE JUDGE, v. BOISE COUNTY.

[16 Pac. 552.]

**SALARY AND FEES OF PROBATE JUDGE.**—The law under which the plaintiff in error claims salary and fees, and upon which his claim is based, was repealed before the services were performed.

**ERROR** to District Court, Boise County.

George Ainslie and J. W. Huston, for Plaintiff in Error.

"The legislative power in each territory shall be vested in the governor and a legislative assembly." Section 1864 of the Revised Statutes of the United States provides that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." The members of the legislature, "to whose judgment, wisdom and patriotism the high prerogative of making laws is intrusted, cannot relieve themselves of the responsibility by choosing other agencies—cannot substitute the judgment, wisdom and patriotism of others for their

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own." "One of the settled maxims of constitutional law," says Judge Cooley, "is that the power conferred on the legislature cannot be delegated by that department to any other body or authority." (*Houghton v. Austin*, 47 Cal. 646, and following; *Savings etc. Assn. v. Austin*, 46 Cal. 416, and following; Cooley's Constitutional Limitations, pp. 116, 117, and notes, and pp. 124, 125, 204; *Taylor v. Stevenson*, ante, p. 180, 9 Pac. 642; *Ex parte Cox*, 63 Cal. 21; *Ruggles v. Collier*, 43 Mo. 353, and authorities therein cited; *S. F. etc. R. R. Co. v. State Board*, 60 Cal. 12-34; *Wayman v. Southard*, 10 Wheat. 1.)

Richard Z. Johnson, Attorney General, and C. S. Kingsley, District Attorney, for Boise County.

As to delegation of legislative powers: The legislature cannot, in a general sense, delegate its legislative authority—its power to enact laws—is a proposition which, at this day, no one will question or deny. But whilst the proposition is undoubtedly true in its more general sense, it cannot be maintained in its most restricted sense. (*Savings etc. Assn. v. Austin*, 46 Cal. 477; *People v. Reynolds*, 5 Gilm. 12; cited 46 Cal. 477, 478.)

HAYS, C. J.—The plaintiff in error, being probate judge of Boise county, filed his claim against said county for salary and fees for the quarter ending July 10, 1887, claiming the same under and by virtue of "An act regulating the salary and fees of the probate judges of Lemhi and Boise counties," approved February 20, 1879. (See 10th Sess. Laws, p. 61.) The board of county commissioners disallowed the claim as filed, from which order the plaintiff in error appealed to the district court, where the order disallowing the claim was affirmed, and plaintiff now brings his cause to this court upon a writ of error.

Many questions have been discussed in this case which we will not consider; for we find that the act of February 20, 1879, upon which this claim was based, was repealed February 10, 1887.

Judgment of the district court is therefore affirmed.

Buck, J., and Broderick, J., concurring.

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Argument for Respondent.

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(February 6, 1888.)

## McGUIRE v. LAMB.

[17 Pac. 749.]

**COUNTERCLAIM—PLEADING.**—A counterclaim alleging a debt due defendant and a former partner, or a stranger to the suit, *held*, to be bad, and a demurrer thereto properly sustained.

**SAME.**—A counterclaim which fails to allege that the debt existed at the commencement of the action, but alleges that it is now due, *held*, to be bad and a demurrer thereto properly sustained.

**FINDINGS—JUDGMENT.**—Where the findings are responsive to all the material issues raised by the pleadings, and they support the judgment, judgment will be affirmed.

(Syllabus by the court.)

## APPEAL from District Court, Ada County.

J. Brumback, for Appellant.

Defendant is permitted to set up as many defenses of new matter or as many counterclaims as he may have, whether legal or equitable. (*Gage v. Angell*, 8 How. Pr. 335; *Waddell v. Darling*, 51 N. Y. 327.) That there must be findings upon all the material issues is already settled by this court in *Bowman v. Ayers*, ante, p. 305, 13 Pac. 346; *Carson v. Thews*, ante, p. 176 9 Pac. 605.

Huston &amp; Gray, for Respondent.

The defendant cannot set up and maintain as a valid counterclaim a right of action subsisting in favor of another person. The test is whether the defendant could have maintained an independent action upon the demand. (*Belleau v. Thompson*, 33 Cal. 495; *Chase v. Evoy*, 58 Cal. 348.) Where a demand sought to be counterclaimed exists in favor of the defendant and a stranger to the action, it cannot be set up. (*Hook v. White*, 36 Cal. 299; *Campbell v. Genet*, 2 Hilt. 290; *Bird v. McCoy*, 22 Iowa, 549; *Weil v. Jones*, 70 Mo. 560; *Harris v. Rivers*, 53 Ind. 216; *Insurance Co. v. Pierce*, 1 Wyo. 45.) The counterclaim must be between the same parties, in the same right, or in the same capacities, as they appear in the original proceeding. (*Naglee v. Palmer*, 7 Cal. 543; *Johnson v. Gunter*, 6 Bush, 534; *Gannon v. Dougherty*, 41 Cal. 661; *Ives v. Miller*,



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19 Barb. 196; *Baldwin v. Berrian*, 53 How. Pr. 81; *Baldwin v. Briggs*, 51 How. Pr. 477; *Hopkins v. Lane*, 87 N. Y. 501.) The original findings were sufficient and covered all the material issues raised by the pleadings, and they are supported by the testimony. (*Cooper v. Kellogg*, ante, p. 330, 13 Pac. 350; *Quinn v. Anderson*, 70 Cal. 454, 11 Pac. 746; *Whittle v. Doty* (Cal.), 12 Pac. 299.) The omission to find on an immaterial issue is not error. (*Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159; *Lowvall v. Gridley*, 70 Cal. 507, 11 Pac. 777; *Cary v. Brown*, 58 Cal. 180.) It was immaterial whether the defendant was an attorney at law or not; a finding either that he was or was not could not have changed the result. (*Tage v. Alberts*, ante, p. 271, 13 Pac. 19; *Robinson v. Placerville etc. R. R. Co.*, 65 Cal. 263, 3 Pac. 878.) It was not error in the court filing amended or additional findings. (*Hays v. Wetherbee*, 60 Cal. 396; *Pratalongo v. Larco*, 47 Cal. 378; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Bosquett v. Crane*, 51 Cal. 505.)

HAYS, C. J.—This was an action brought by plaintiff against defendant upon a promissory note given by defendant to plaintiff. The defendant did not deny the cause of action set out in the complaint, but set up three counterclaims. The plaintiff demurred to each of the counterclaims. The demurrer was sustained as to the first and third, but overruled as to the second. The defendant duly excepted to the ruling of the court, and now assigns the same as error.

The first counterclaim is as follows: "That from July 1, 1884, to June 15, 1885, this defendant and one H. E. Prickett were partners in the practice of law, doing business under the firm name of Prickett & Lamb; that during said time said H. E. Prickett and this defendant were each attorneys and counselors at law, practicing as such in the various courts of Idaho territory; that on the fifteenth day of June, 1885, said H. E. Prickett deceased, leaving this defendant the surviving partner; that between the first day of December, 1884, and the first day of June, 1885, this defendant, as such partner, counseled and advised plaintiff, at his request, in and about certain matters and difficulties between said plaintiff and one Nora Gess, since become the wife of plaintiff, and in attending in and about the said business of the plaintiff; that said services were

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reasonably worth the sum of \$200, no part of which has been paid." The statutes provide that a counterclaim must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action. It seems to be well settled that the defendant cannot set up and maintain as a valid counterclaim a right of action subsisting in favor of another person. The test is whether the defendant could have maintained an independent action upon the demand. If it exists in favor of defendant and a stranger to the suit, it cannot be set up. (*Hook v. White*, 36 Cal. 299; *Weil v. Jones*, 70 Mo. 560; 7 *Wait's Actions and Defenses*, p. 540, sec. 4, and cases there cited.) Pomeroy, in his work on Remedies and Remedial Rights, section 751, says: "Where a party is sued, a demand in favor of himself and a former partner, not a party to the suit, is inadmissible as a counterclaim." This seems to be abundantly sustained by the authorities. It follows, therefore, that the demurrer to the first counterclaim was properly sustained.

The third counterclaim is as follows: "That from the first day of June, 1884, up to the first day of July, 1886, the plaintiff and this defendant were partners in the manufacture and sale of lumber and shingles in Idaho territory, under the firm name of Lamb & McGuire; that the interest of plaintiff in said partnership was one-third, and the interest of defendant was two-thirds; that the plaintiff and defendant, as such partners, during said time, engaged in the business of manufacturing and of selling and disposing of the same in Idaho territory; that the books of said partnership were kept by one George M. King and one J. C. Shainwald; that this defendant is informed and believes that the liabilities and losses of said partnership have been about \$25,000, all of which have been paid by this defendant; that this defendant is informed and believes that there is now due and owing to this defendant from said plaintiff for and on account of said partnership the sum of \$8,333, no part of which has been paid." Did the court err in sustaining the

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demurrer to the third counterclaim? Clearly not, for, from an examination of the transcript before us, we find the action was commenced on the seventh day of September, 1886, and the answer was sworn to on the eleventh day of April, 1887; and the defendant nowhere says that he had paid the liabilities and losses of the partnership before or at the commencement of this action. Again, the defendant says that there is now due and owing to this defendant from said plaintiff for and on account of said partnership the sum of \$8,333, no part of which has been paid. He does not say or claim that this demand existed at the commencement of this action. Not having alleged this, the demurrer was properly sustained. (*Rice v. O'Connor*, 10 Abb. Pr. 362; *Chambers v. Lewis*, 11 Abb. Pr. 210.) The third counterclaim of the answer may be true, and yet the defendant have no claim against the plaintiff at the commencement of the action, for he says it is now due. We think he should have stated that at the commencement of the suit the claim was due, or words to that effect. We think there is a marked difference between the case at bar and the cases of *Gage v. Angell*, 8 How. Pr. 335, and *Waddell v. Darling*, 51 N. Y. 327, cited and relied upon by defendant. In the former case the counterclaim alleges the partnership had been dissolved prior to the commencement of the action; and on page 337 of said case the learned judge says: "Counterclaims, to be available as a defense to an action, must arise upon contract, and must exist at the commencement of the action." In *Waddell v. Darling*, *supra*, the defendant alleged the dissolution of the partnership at a time that was doubtless before the commencement of the action, and also asked for an accounting, and the application of the balance found due; while in the case at bar the dissolution of the partnership is not alleged, nor is any accounting asked for.

The case was tried upon the issues formed by the second counterclaim, before the court without a jury. Findings of fact and conclusions of law filed, and judgment entered thereon. After entry of judgment, exceptions were taken thereto, and during the term in which the case was tried the judge filed further and amended findings, to which defendant excepted. The object of an exception is to call the attention of the judge to the particular point complained of, so that he may have an opportunity to correct the same, and thus relieve the party ob-

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Argument for Appellant.

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jecting from the operations of the supposed error. To hold that the judge has no power to amend his findings after exceptions had been taken thereto would be to hold that the judge had no power to correct the error complained of, and would deprive the party complaining of the right which the exception was intended to give him. Of the right to amend findings before judgment we have no doubt. (*Hayes v. Wetherbee*, 60 Cal. 396, and cases there cited; Hayne on New Trial and Appeal, sec. 347.) That they could not do so after an appeal from the judgment had been taken we think equally clear; but whether the judge can amend or file new findings after entry of judgment, and before appeal is taken, is a query which we deem it unnecessary to discuss or decide at his time, for we think the findings, as entered before judgment, were responsive to all the material issues raised by the pleadings, and that they were sufficient to support the judgment.

We have carefully examined all the points discussed by appellant, and, finding no error, the judgment is affirmed.

Buck and Broderick, JJ., concurring.

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(February 8, 1888.)

**PALMER ET AL. v. UTAH AND NORTHERN RAILWAY COMPANY.**

[16 Pac. 553.]

**DECISION OF APPELLATE COURT—LAW OF CASE.**—The decision of the appellate court upon any matter properly before it on the records becomes the law of the case in all subsequent proceedings therein.

**RESPONSIBILITY OF RAILROAD—CANNOT AVOID.**—A railroad company cannot avoid the responsibility of operating its road by allowing others to have the control and management of its roadbed or trains without the consent of the power whence it derives its franchises.

(Syllabus by the court.)

**APPEAL** from District Court, Bingham County.

P. L. Williams and W. H. Savidge, for Appellant.

The procedure in death by wrongful act cases, and the particular parties to them, are subject to statutory regulation, and only the parties named in the statute can sue. (*Hagen v. Kean*,

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3 Dill. 124, Fed. Cas. No. 5899; *Kramer v. Railroad Co.*, 25 Cal. 435; *Carey v. Railroad Co.*, 48 Am. Dec. 635, note 4; *Dye v. Dye*, 11 Cal. 163.) The essential facts in every case must be averred directly, and cannot be left to inference. (*Harris v. Hillegass*, 54 Cal. 463; *Stringer v. Davis*, 30 Cal. 318.) The deceased was not a passenger, but an employee, at the time of his death. The court should therefore have admitted in evidence the pass on which the deceased was riding. (*Vick v. Railroad Co.*, 95 N. Y. 267, 47 Am. Rep. 36; 2 Rorer on Railroads, 1107; *Abend v. Railway Co.*, 17 Am. & Eng. R. R. Cas. 614, and cases cited in note.)

Smith & Smith, J. H. Hawley and H. M. Bennett, for Respondents.

Quasi public corporations, conducting great enterprises, like the operating of a railway, cannot absolve themselves from loss for the negligent conduct of that business, by simply leasing to some foreign or insolvent person or corporation, except such leasing be done by and with such consent of the legislative power which organized them and granted them their franchises. (2 Rorer on Railroads, sec. 22, p. 1115; *Macon etc. R. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Railroad Co. v. Winans*, 17 How. 39; *Nelson v. Railroad Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Thorpe v. Railroad Co.*, 13 Hun, 70.) If the negligence of a master combines with the negligence of a fellow-servant, and the two contribute to the injury of another servant, himself free from negligence, the master is liable. (*Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Booth v. Railroad Co.*, 73 N. Y. 38, 29 Am. Rep. 97, and note; *Paulmier v. Railroad Co.*, 34 N. J. L. 151; *Crutchfield v. Railroad Co.*, 76 N. C. 320.)

BUCK, J.—This is an action brought by the plaintiffs to recover damages for the death of William O. Palmer, alleged to have been killed in Bingham county on the eleventh day of December, A. D. 1885, through the negligence of the defendant in operating the train upon which deceased was riding at the time of his death. The cause was first tried in 1886, and on appeal to this court a new trial was granted. It was tried a second time, at the May term, 1887, and verdict rendered for the plaintiffs for damages in the sum of \$16,702.85 and costs,

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which was reduced to \$10,000 by the court as a condition upon which the motion for new trial was overruled. It now comes up on appeal from the order overruling defendant's motion for a new trial for errors occurring on the second trial.

The appellant assigns six errors in his brief upon which he relies: 1. In overruling defendant's demurrer to the second amended complaint; 2. The refusal of the court to allow the defendant to amend its answer; 3. Excessive damages appearing to have been given under the influence of passion or prejudice; 4. Insufficiency of the evidence to justify the verdict; 5. That the verdict was against law; 6. Errors in law occurring at the trial and specified in the assignment of errors.

The order of the court in overruling the defendant's demurrer to the second amended complaint was considered on the former appeal of this case, reported in ante, p. 315, 13 Pac. 425, and sustained, and the ruling thereon becomes the law of this case. (2 Hayne on New Trial and Appeal, sec. 291; *Phelan v. San Francisco*, 20 Cal. 40; *Davidson v. Dallas*, 15 Cal. 82; *Ex parte Sibbald*, 12 Pet. 491; *Bridge Co. v. Stewart*, 3 How. 413; *Supervisors v. Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 462.)

The second error assigned is the overruling of defendant's motion to amend its answer after a new trial had been granted. Amendments to pleadings rest largely in the discretion of the court, and rulings thereon by the trial court will not be disturbed on appeal, except it appear that the exercise of such discretion has deprived the party complaining of some substantial right. It has been held that such amendments should not be allowed after a new trial has been granted (*Bliss on Code Pleading*, sec. 430; *Spanagel v. Reay*, 47 Cal. 608), nor when the amendments offered deny matters before admitted by the pleadings to be true. (*Bliss on Code Pleading*, sec. 430; *Harrison v. Hastings*, 28 Mo. 346.)

The complaint alleges that the defendant owned and operated its railroad and was a common carrier of passengers at the time the deceased was killed. This was not denied in the answer, and was therefore admitted and taken as true upon the first trial. The amended answer refused by the court denies that the defendant was operating said road or was a common carrier of passengers, and alleges that said road and trains upon it

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were operated by another company, to wit, the Union Pacific Railway Company. The refusal of the court to allow the amendment is clearly sustained by the authorities above cited. An inspection of the proposed amended answer, however, sustains the ruling of the court upon the additional ground that it set up no defense to the action. Whether it was intended to set up matter in avoidance of facts alleged in the complaint, and not denied in the answer, or to deny such facts and to set up a new defense, is not clear. The purpose seems to have been to set up new matter which would shift the responsibility of operating the defendant's road from the defendant to the Union Pacific Railway Company, who are alleged therein to have been in the exclusive possession of defendant's road, and the owners of and operating the train upon which deceased was riding at the time of the accident, resulting in his death. The amended answer does not explain the relation existing between defendant and the Union Pacific Railroad. It simply alleges that said Union Pacific Railroad was at the time and since in the exclusive possession of its roads, and operating its trains. All that is set up in the said amended answer might be true, and yet the Union Pacific Railroad be but the employee of defendant. In either event, we think the defendant could not so shift the responsibility of operating the road without the consent of the power whence it obtained its franchise, and as no such consent was alleged, the proposed amended answer set up no defense to the action, and the motion to file the same was properly denied. (*Abbot v. Railroad Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Macon etc. R. R. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Railroad Co. v. Brown*, 17 Wall. 445; 2 Rorer on Railroads, 1115, sec. 22.)

The third point made by appellant is that the damages allowed by the jury were excessive, appearing to have been given under the influence of passion and prejudice. Our code, section 192, provides that in actions of this nature "such damages may be given as under all the circumstances of the case may be just."

The fourth alleged error urged by appellant is that the evidence is insufficient to sustain the verdict. An examination of the evidence fails to convince the court that either the third or fourth assignment of error is well taken.

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Points decided.

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The fifth error assigned by appellant is that the verdict is against law, and the sixth error of the court occurring on the trial.

It is urged under these two points that the jury disregarded the instructions of the court in finding the damages given the plaintiffs, and that the court erred in its rulings as to the admission of evidence and as to the amendments of the pleadings. The ruling as to the pleadings we have already considered. We have carefully examined the instructions of the court and the rulings as to the admission of evidence, and find no error.

No error appearing on the record, the judgment is affirmed.

Hays, C. J., and Broderick, J., concurring.

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(February 13, 1888.)

UNITED STATES v. ALEXANDER ET AL.

[17 Pac. 746.]

**PLEADING—VERIFICATION—PRACTICE.**—Under our practice, generally, where the complaint is not verified, a general denial by defendant puts in issue the substantive allegations of the complaint, but where the action is brought upon a written instrument, and a copy of such instrument is set out or annexed to the complaint, the genuineness and due execution of the instrument are deemed admitted unless the answer specifically denies the same and is verified.

**EXCEPTIONS—STATEMENT.**—A bill of exceptions settled and signed by the trial judge will be treated as such, although it is called a statement on motion for a new trial.

**PRACTICE—DEMURRER.**—Where the record shows that a general demurrer was filed, but is silent as to any disposition of the same, the presumption will be indulged on appeal that the demurrer was overruled or abandoned.

**PRACTICE—OFFER OF EVIDENCE.**—An offer or oral proof being made and rejected and exceptions duly taken, the appellate court must be satisfied from the record that the offered evidence was material or tended to support some issue involved before it will be treated as error.

**CHALLENGE—JURORS—DISCRETION.**—Great latitude of discretion is allowed to the court in the trial of challenges for cause, and where on an examination for cause a juror states in substance that he



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Argument for Appellants.

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has an opinion in favor of the defendants, but in spite of that opinion he could act upon the evidence and law of the case, and the juror was rejected, this court will not interfere with the discretion of the trial court, even though the members of this court should believe from the record that the juror so excluded was competent.

**NUMBER OF PEREMPTORY CHALLENGES.**—The legislature did not intend, where in an action there are several parties on either side, that each individual should have four peremptory challenges, but that they should join and have one set on either side.

**CHALLENGES FOR CAUSE—EXAMINATION.**—Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was had, *held*, that a substantial right of the party was denied for which a new trial will be granted.

(Syllabus by the court.)

**APPEAL** from District Court, Nez Perces County.

Winston & Reid and Moody & Curtis, for Appellants.

If an allegation can be made the subject of a material issue, it should not be stricken out. (*Green v. Palmer*, 15 Cal. 412, 76 Am. Dec. 492.) The plaintiff demurred in general terms. Either all or no part of the answer should have been stricken out on his demurrer. (*Ferrier v. Ferrier*, 64 Cal. 23, 27 Pac. 960.) If a complaint contains several counts, and the defendant demur to the whole complaint, the demurrer should be overruled, if there is one good count in the complaint, although the other counts may be bad. (*Stoddard v. Treadwell*, 26 Cal. 294; *Griffiths v. Henderson*, 49 Cal. 567; *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369; *White v. Lyons*, 42 Cal. 279; *McPherson v. Weston*, 64 Cal. 281, 30 Pac. 842.) A general demurrer to an answer cannot be sustained when there is one count that presents an issue for trial. (*Board v. Long*, 8 Colo. 438, 8 Pac. 923; *Caldwell v. Ruddy*, ante, p. 1, 1 Pac. 339.) The sufficiency of the justification of the postmaster was a matter for the jury to try. (*Granniss v. Irwin*, 39 Ga. 22.) Parol evidence is admissible, not only to explain, but to apply, the writing. (*Randolph v. Helps*, 9 Colo. 29, 10 Pac. 245; *Suffern v. Butler*, 21 N. J. Eq. 410.) If the ambiguity is raised by extrinsic evidence, it may be removed in the same manner. (*Reynolds v. Jourdon*, 6 Cal. 109; *Reamer v. Nesmith*, 34 Cal. 624; *Callahan v. Stanley*, 57 Cal. 476.) The plaintiff, having made the paper writing purporting to be a copy of the bond sued on

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a part of the complaint, and the court having allowed the same in evidence, against the objection of defendants, all the words and figures written therein or indorsed thereon are proper subjects of argument and comment by counsel. (*Hobart v. Tyrrell*, 68 Cal. 12, 8 Pac. 525; *Murdock v. Brooks*, 38 Cal. 596; *People v. Hagar*, 52 Cal. 172.) Each of the five defendants was entitled to four peremptory challenges. (Gen. Laws, 11th Sess., sec. 367; Civ. Code, sec. 4379.) The defendants having introduced no testimony, the court erred in refusing to allow their counsel to conclude the argument to the jury. (Gen. Laws, 11th Sess., sec. 371; 18 Cent. L. J. 363.)

James H. Hawley, United States Attorney.

A statement on appeal must specify the particular points upon which the appellant will reply upon appeal, and so much of the evidence as is necessary to explain said points. (Rev. Laws, sec. 4441, subds. 3, 4; *Barrett v. Tewksbury*, 15 Cal. 354; *Burnett v. Pacheco*, 27 Cal. 408; *Mining Co. v. Irvine*, 32 Cal. 303; *Ferrer v. Insurance Co.*, 47 Cal. 416; *Spencer v. Long*, 39 Cal. 700; *Brumagim v. Bradshaw*, 39 Cal. 33.) It is not sufficient to state matters rendering it possible that evidence may have been received that was improper, but the evidence itself must be stated in the statement. (*Bush v. Taylor*, 45 Cal. 112; *Doyle v. Franklen*, 48 Cal. 540; Idaho Rev. Laws, sec. 4820; *Brown v. Gray*, 6 Jones (N. C.), 103, 72 Am. Dec. 563; Hilliard on New Trials, c. 13, secs. 17, 25.) A juror is not disqualified by having expressed an opinion on a question involved in the litigation. (Hilliard on New Trials, 147; *Royston v. Royston*, 21 Ga. 161.) Because a juror answers he can act impartially on the testimony, the court is not bound to accept him. (Hilliard on New Trials, 149.)

BRODERICK, J.—This action was commenced against the sureties on the official bond of Isaac N. Hibbs, late postmaster at Lewiston, to recover the sum of \$10,000, alleged to have been received from the United States by said Hibbs, as postmaster, and which he failed and refused to account for. The complaint is in the usual form, is not verified, but a copy of the bond is annexed thereto, and made a part of the complaint. The cause was tried at the December, 1886, term of said court, and resulted in a judgment against the defendants for the sum de-

manded. The defendants moved for a new trial. The motion was overruled, and from the judgment, and the order overruling the motion for a new trial, the defendants appealed.

The record consists of the judgment-roll, and what purports to be a statement on motion for a new trial. Upon the argument here, counsel for respondent contended that the statement was not properly made and should be disregarded. Under our statutes as construed by this court, there is no substantial difference between a statement and bill of exceptions. The name given to the document is of little consequence. If it brings here the rulings or decisions of the court below, the objections and exceptions thereto, and is duly certified, it should be treated for what it is and not for what it may have been called. In this case it is clearly a bill of exceptions, is certified as such, and must be so considered. (*Bradbury v. Improvement Co.*, ante, p. 239, 10 Pac. 620; *Schultz v. Keeler*, ante, p. 333, 13 Pac. 481.)

The first assignment of error which we shall notice is the decision of the court in striking out, on motion, all the answer except the first paragraph thereof. This paragraph is, in substance, a general denial. Counsel for appellants argued at the bar that the several allegations of the answer, except the general denial, were stricken out on general demurrer, and that, as the answer contained a denial, and was good thus far, the demurrer should have been overruled. We were "almost persuaded" that this point was well taken. It was a good argument, and well put, but the record is at variance with the argument. The transcript shows that a part of the answer was stricken out on motion, and not on demurrer. It is true a demurrer was filed, and the record is silent as to what disposition was made of it. In such case, on appeal it will be presumed that the demurrer was either abandoned or overruled. (*Guthrie v. Phelan*, ante, p. 95, 6 Pac. 108.) After the motion to strike out was disposed of, the defendants had left a general denial of the allegations of the complaint, and a trial was had of the issues thus joined. The answer was not verified, and hence did not put in issue the execution of the bond sued on. Section 4200 of the Code of Civil Procedure provides that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the

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Opinion of the Court—Broderick, J.

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genuineness and due execution of such instrument are deemed admitted unless the answer denying the same is verified." To have put in issue the execution or genuineness of the instrument, a specific, verified denial was necessary. This disposes of the objections raised to the introduction of the original bond. Its execution and genuineness having been admitted by answer, it would seem unnecessary to have offered it in evidence unless for the purpose of having it placed among the files, and hence no objection would lie to its reception.

Under the pleadings, the issues to be tried were whether Hibbs had, as postmaster, received this amount of money from the government, and had failed and refused to account for the same, or any part thereof, and whether demand had been duly made. In this state of the case the plaintiff was put to the proof of these allegations, and the defendants, under their general denial, could have introduced evidence to negative each and all of these averments. In other words, we understand that, under our practice generally, where a complaint is not verified, a general denial puts the plaintiff to the proof of the substantive allegations upon which his right of recovery depends, and that plaintiff's *prima facie* case, when made, may be controverted and overcome by defendant. But this is not so when the action is brought upon a written instrument, and a copy is set out, or annexed to the complaint, and the defendant questions the instrument itself; nor is a general denial sufficient where a defendant has an affirmative defense in the nature of an avoidance. (Bliss on Code Pleading, sec. 324; *Lattimer v. Ryan*, 20 Cal. 628.) In this case there was clearly nothing in the paragraphs of the answer stricken out that would warrant or allow any evidence which could not have been introduced under the general denial, and hence there was no error in this ruling.

Appellants complain of the ruling of the court in excluding the offer to prove, by one Kress, the meaning of certain letters and figures indorsed on the original bond. The record does not show that any question was propounded, but the witness was produced, and counsel offered to prove by him what the letters "M," "O," and "P," and the figures "\$6,000" and "\$4,000," meant. An objection was interposed to this offer, and was sustained by the court. We understand the rule to be that, where

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an offer of oral proof is made, the court must be satisfied of the good faith of the offer, and of the materiality of the evidence, otherwise it may properly be excluded. In this case there is nothing in the transcript to show or indicate that it was relevant to any issue involved, or would in any manner have aided the defense. If it appeared in any view of the case to be relevant, or if counsel had stated, in connection with the offer, that they intended to follow it up with other evidence which would make it material, then we think it would have been proper to have allowed it to go to the jury; but the bare offer to explain the letters and figures that had at some time been written on the back of the bond, without a pretense that it was material to the issues, has nothing to commend it, and we think was properly excluded. (*Scotland Co. v. Hill*, 112 U. S. 186, 5 Sup. Ct. Rep. 93; *Schmidt v. Pfeil*, 24 Wis. 321; *Wilson v. Noonan*, 35 Wis. 360.)

While impaneling the jury, one juror stated that he had "formed an opinion in favor of the defendants, but in spite of that opinion he could render a verdict according to law and the evidence in the case." This juror was challenged for cause, the challenge sustained, and to this ruling the defendants excepted. Great latitude of discretion must necessarily be allowed to the court in the trial of challengers for cause, and the rule is now well settled that the decision of the court on challenges for cause will not be disturbed unless it clearly appears that there was an abuse of discretion. The reason for this rule is obvious. The judge who tries the cause, sees the person called as a juror, hears his answers, and observes his manner and demeanor in the jury-box, can much better judge of his fitness and qualifications than can an appellate court from an examination of the record. But, if the ruling in the case at bar was erroneous, we think it would still devolve upon the appellants to show prejudice, and this they have not attempted to do. It has been well stated, in treating of this subject, that "neither party can be said to have a vested interest in any juror; therefore, although in impaneling a jury one competent person has been rejected, yet, if another equally competent person has been substituted in his stead, no injury has been done." (Thompson & Merriam on Juries, sec. 251, and cases there cited.) Applying these

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rules to the question under consideration, we see nothing in the ruling on this point of which appellants can complain.

In impaneling the jury the defendants were restricted by the court to four peremptory challenges, and of this they complain. The number of peremptory challenges is fixed by the statute, which provides in civil cases that each party is entitled to four, and where there are several parties on either side, they must join in a challenge before it can be made. We do not think the legislature intended that, where there are several parties on either side, each individual should have four challenges, but that they should join, and have one set on either side. (Abbott's Trial Evidence, 23.)

There is but one other question in the record we think deserves consideration. The bill of exceptions shows that when one of the jurors was called into the box, and sworn to answer as to his qualifications, he was asked by defendants' counsel the following question: "Have you formed or expressed the opinion that there is due the government any money from the bondsmen of J. N. Hibbs by reason of his defalcation?" This question was objected to, the objection sustained, and an exception taken. The record does not disclose the ground of the objection, nor does it indicate that any other question was propounded to the juror, or that any evidence was received as to his qualifications. All that is shown is the one interrogatory, the objection, the decision thereon, the exception, and that the juror served. It further appears that the defendants had, at this stage of the trial, exercised four peremptory challenges, and interposed another which was denied. The right given to challenge for cause carries with it the right to examine for cause, or have the court do so. While the court should control the examination, and may restrict it to the statutory grounds, yet the right of a party to know whether a juror is qualified and competent is a substantial right that cannot, under our law, be denied. This seems to be conceded, but it is suggested that, as the record is silent as to any other or further interrogation of this juror, we must presume that his competency was shown. We have held that the document in the transcript, denominated a statement, is in reality a bill of exceptions. Since this is so, we must presume that it contains all the evidence and other matters material to the exceptions. This presumption will always be indulged un-

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Argument for Appellants.

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less the contrary affirmatively appears from the record. (Hayne on New Trial and Appeal, sec. 258; *People v. English*, 52 Cal. 211, *Schultz v. Keeler*, *supra*.) Under the facts of this case as disclosed by the record, we think the court erred in sustaining the objection to the question propounded to the juror. The judgment is therefore reversed, and cause remanded for a new trial.

Hays, C. J., and Buck, J., concurring.

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(February 20, 1888.)

MCGINNIS ET AL. v. FRIEDMAN.

[17 Pac. 635.]

**INJUNCTION—WHAT MUST BE SHOWN TO OBTAIN.**—Where a party seeks relief by interlocutory injunction, he should show some clear, legal or equitable right, and an apprehension of immediate injury to those rights. Where none such are shown, the injunction will be denied.

**PASTURING PUBLIC LANDS.**—The fact that a party has pastured the public lands of the United States without claim of title, or connecting himself therewith under some of the possessory acts, will not give a legal or equitable right to the pasture grown thereon.

**TO PREVENT CRIME.**—Courts of equity will not interfere by injunction to prevent the commission of a crime where no property rights are invaded.

(Syllabus by the court.)

**APPEAL** from District Court, Alturas County.

George H. Roberts and Vic Bierbower, for Appellants.

The law will not allow a person by repeated trespass to completely destroy another's property. Equity will interfere. (*Stone v. Lumber Co.*, 59 Mich. 24, 26 N. W. 216.) In relation to public lands, which are not mineral lands, the title, as between citizens of the territory, where neither connects himself with the government, is considered as vested in the first possessor; and, to proceed from him, this possession must be actual, and not constructive. (*Feirbaugh v. Masterson*, 1 Idaho, 135.) Possession of a part draws after it the possession of the whole. (*Plume v. Seward*, 4 Cal. 95, 60 Am. Dec. 599,

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Argument for Respondent.

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and note; *Feirbaugh v. Masterson*, 1 Idaho, 135; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103, and note; *McKee v. Greene*, 31 Cal. 418; *Donahue v. Gallavan*, 43 Cal. 573; *Ayers v. Bensley*, 32 Cal. 620.) Where the title to land rests in the possession only, the prior possessor has the better title. (*Ayers v. Bensley*, 32 Cal. 620.) One in possession can maintain ejectment against an intruder, and such intruder cannot set up title in third person to defeat the suit. (*Southmayd v. Henley*, 45 Cal. 102.) If plaintiff shows possession in himself, or a better title to possession than the defendant, the defendant cannot overcome to title of plaintiff by showing title in a stranger, nor can he obviate the consequences of his trespass by showing that plaintiff was a trespasser upon a third person. (*Carleton v. Townsend*, 28 Cal. 219; *Richardson v. McNulty*, 24 Cal. 347; *Hubbard v. Barry*, 21 Cal. 321.)

Bruner, Parsons & Bruner, for Respondent.

To warrant the interference of equity in restraint of trespass, complainant's title must be clear. (1 High on Injunctions, secs. 9, 651, 675, 698, 754; *State v. McGlynn*, 20 Cal. 275; *Harrell v. Hannum*, 56 Ga. 508.) Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. (*Orton v. Smith*, 18 How. 263, 266.) Equity has no jurisdiction to restrain the commission of crimes. (1 High on Injunctions, secs. 20, 29; *Attorney General v. Insurance Co.*, 2 Johns. Ch. 371; *Mayor etc. v. Thorne*, 7 Paige, 261; *Village of Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *Village of St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671.) In order for plaintiffs to maintain their action, they must reside upon the land in question, either in person or by agent. (Idaho Rev. Stats., c. 4, tit. 10; *Wolfskill v. Malajowich*, 39 Cal. 276.) The possession must be actual, and subject to the will and dominion of claimants. (*Coryell v. Cain*, 16 Cal. 573; *Feirbaugh v. Masterson*, 1 Idaho, 135; *Preston v. Kehoe*, 15 Cal. 315; *Wolf v. Baldwin*, 19 Cal. 306; *Polack v. McGrath*, 32 Cal. 15.) The assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim or color of title or asserted right, is unlawful. (23 U. S. Stats., at Large, p. 321;



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*Villey v. Jarreau*, 35 La. Ann. 542; *Doran v. Railroad Co.*, 24 Cal. 257.)

HAYS, C. J.—This action was brought to restrain the respondent from herding, grazing, and pasturing his sheep upon certain public lands, the property of the United States. A temporary injunction was granted, and, the case coming to be heard upon an agreed state of facts, the injunction formerly entered was dissolved, and from this order the appeal is taken to this court. It appears that the premises to which the injunction applied consists of a large tract of the public lands of the United States, only a part of which has been surveyed; one of the ranges being about fifteen miles long and five miles wide, as stated in appellant's brief. We are not informed as to the size of the other. These appellants have used said ranges for several years for the purpose of pasturing their cattle and horses on the same during the winter seasons; said ranges being very valuable for that purpose. The stock thus wintered upon said ranges is driven to other parts in the summer season. It is admitted that sheep, cattle, and horses will not thrive and prosper when on the same range; that sheep will thrive where cattle will not. Shortly before bringing this action, the respondent brought a large flock of sheep to this section of the country, and proposed to graze, pasture, and winter them on the ranges in controversy; whereupon this action was brought. It is claimed by appellants that they have a right to hold and use said grounds for winter pasturage, and to exclude the respondent from pasturing his sheep thereon for two reasons: 1. Because of their priority of possession, they having enjoyed that privilege for several years past: 2. Because of the provision of the Revised Statutes of this territory, which is as follows: Sec. 6872. "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed, or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle-grower, either as a spring, summer, or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

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Opinion of the Court—Hays, C. J.

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Although the case was ably presented at the bar, and marked industry and ability have been shown by appellants in the preparation of their briefs, they fail to cite us to any case directly in point, and we presume none could be found sustaining their position. As a general rule, it is incumbent upon the party seeking relief by interlocutory injunction to show some clear, legal or equitable right, and a well-grounded apprehension of immediate injury to those rights. This position is announced and abundantly sustained by 1 High on Injunctions, sections 7, 9, 651, 652-698, and the cases cited. (Hilliard on Injunctions, 319.) The appellants in this case do not pretend to connect themselves with the land by color of title, or to hold the same under any possessory claim or right, with a view of entering said lands under any of the general laws of the United States; hence we are unable to see that they have shown in themselves any clear legal or equitable right to the pastures grown upon the said lands. Such being the case, they would not be entitled to the equitable intercession of the court, and the injunction theretofore granted was rightfully dissolved.

The appellants claim, however, that they have held these ranges for several years, and therefore they hold the same now under an adverse possession, as to this respondent, from entering thereon with his sheep. We think a court of equity should not interfere to enforce such a claim by injunction, in view of the act of Congress of February 25, 1885 (23 U. S. Stats. at Large, p. 321), which provides, in substance, among other things, that the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States without claim, color of title, or asserted right, as therein specified, is declared to be unlawful, and thereby prohibited. When we take into consideration the object, purpose, and spirit of that law, and the fact that appellants do not claim to hold by virtue of any of the possessory acts, but only by their right of prior possession, we think that said act of Congress is a complete answer to all authorities cited and arguments urged upon that point. If, therefore, the action cannot be maintained because appellants have no legal or equitable title to the pasture in dispute, we think that the second ground urged, that the threatened act will be a violation of the Revised Statutes before quoted, is equally untenable; for it is a general rule that a court of equity

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Argument for Appellant.

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has no jurisdiction to restrain or prevent crime, or to enforce a moral duty, except so far as the same is connected with the rights of property. The appellants having failed to show any property rights to the pasture, the exception to this general rule cannot be invoked by them.

Many reasons might be given in support of the correctness of the judgment in this case, but we think a further discussion of the subject unnecessary. Judgment of the court below is therefore affirmed.

Buck and Broderick, JJ., concurring.

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(February 20, 1888.)

OREGON SHORT LINE RAILWAY COMPANY v.  
YEATES.

[17 Pac. 457.]

RAILROAD PROPERTY LOCATED OFF RIGHT OF WAY—ASSESSED BY WHOM.

Where machine and repair shops are situated upon lands other than the right of way, but are connected with the main line of the railroad by sidetrack, *held*, that under section 1463 of the Revised Statutes they should be assessed by the local assessor, rather than by the territorial board of equalization.

(Syllabus by the court.)

APPEAL from District Court, Alturas County.

R. Z. Johnson, Attorney General, Vic Bierbower and George H. Roberts, for Appellant.

Oregon Short Line Railway Company was created a railway corporation in territories of Utah, Idaho and Wyoming by act of Congress, August 2, 1882. (U. S. Stats., 81, 82, p. 185.) The sworn statement required of the president, etc., of railroad corporations is not binding upon the state board, and may be disregarded by it in the assessment. (60 Cal. 12.) The underlying principle of all construction is that the intent of the legislature should be sought, in the words employed to express it, and that when found it should be made to govern, not only in all proceedings which are had under it, but in all judicial controversies which bring those proceedings under review. (Cooley

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on Taxation, 2d ed., p. 264; *United States v. Fisher*, 2 Cranch, 358; *Spencer v. State*, 5 Ind. 41.).

P. Williams, for respondent.

No brief filed.

HAYS, C. J.—By the act of Congress of March 3, 1875 (1 Supp. U. S. Rev. Stats., p. 91), the right of way was granted through the public lands of the United States in this territory to any railway company duly organized under the laws of any state or territory, upon certain conditions, to the extent of one hundred feet on each side of the center line of said road, “also grounds adjacent to such right of way for station buildings, depots, machine-shops, sidetracks, turnouts, and water stations—not to exceed in amount twenty acres for each ten miles of road.” The respondent company was duly organized, and obtained the right of way, under said act, through the lands of the United States in this territory, and built their road thereon. Section 1463 of the Revised Statutes of this territory is as follows: “The president, secretary, superintendent, or other principal accounting officers of any railroad or telegraph company having property in this territory, whether incorporated under the law of this territory or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath of the person so listing, all the following described property belonging to said corporation within the territory, viz.: Roadbed, superstructure, right of way, and all structures situated thereon, rolling stock, sidetrack, telegraph lines, furniture and fixtures, and personal property belonging to such corporation. Such list shall contain, first, the number of miles of such railroad or telegraph line in the territory, and the number of miles of the same in each organized county therein; and such return must be made to the territorial comptroller on or before the first day of April, annually. If the return aforesaid be not received by said comptroller by the third day of April, he must thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that same purpose may address a written communication to the corporation, or to some officer of the corporation who has failed or refused to

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make the return aforesaid. As soon as practicable after the comptroller has received said return, or procured the information to be set forth in said return, a meeting of the territorial board of equalization, consisting of the governor, territorial treasurer, and comptroller, shall be held at the office of said comptroller; and the said board must then value and assess the property of said corporation for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of said road or line. In making up such valuation or assessment, the said board shall examine and consider the return herein required to be made, or the information procured by the comptroller in default of such return, together with such other reliable information relative thereto as they may be able to procure. Said board shall not assess the value of any machine-shop or repair shop or other buildings not situated on said right of way or grounds or other real estate of any corporation or company within this territory; but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops, or other buildings or grounds, or other real estate is situated, to assess the same, and make return thereof, in the manner provided for the assessment and return of real estate belonging to individuals, on or before the second Monday of May, or as soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assessment. The territorial comptroller must certify to the clerks of the boards of county commissioners of the several counties in which property of the aforesaid corporations, or any part thereof, may be situated, the assessment per mile so made on the property of any such corporation, specifying the number of miles, and amount, in each of said counties. The county commissioners must thereupon divide and adjust the number of miles, and the amounts, falling within each precinct, city, town, school district, or other division, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property, or assessment-rolls, returned by the several assessors. The comptroller must certify whether a return was made to him by such corporation, or proper officer thereof, or whether the information required in and by such returns was procured by himself; and in case the return was not made as required by

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this act, or, being made, was not sworn to, it is the duty of the county commissioners to add any amount not exceeding ten per cent to the valuation thus brought before them."

The officers of the railroad company, in listing its property, pursuant to this statute, for assessment by the territorial board of equalization, listed, together with their road and right of way, the machine and repair shops, and the other property described in the complaint, which is situate at Shoshone in Alturas county. The said board assessed the right of way, and such property as they found to be thereon, but did not assess the property described in the complaint, because they thought the same was not upon the right of way, and that they had no authority, under the statute, to do so, and notified the assessor of Alturas county of this fact. The county assessor then assessed the same, and made return thereof. The respondent then brought this action to restrain this appellant from assessing or collecting any tax on the property described in the complaint. The case coming on to be heard, the facts were stipulated as follows: "1. It is hereby stipulated, by and between the parties hereto, that the machine and repair shops, roundhouse, and other buildings, mentioned in the pleadings herein, and situated at Shoshone station, in said county, are more than 100 feet from the main track of plaintiff's railway, and within 400 feet thereof; that the said main track, at and near shops and other buildings, runs in an easterly direction, and said shops are on the south side of said main track; that there are three sidetracks, running through or near said shops and buildings, which are united, by means of switches, both to the east and west thereof, into a single sidetrack; and such single track unites, by means of switches, with the said main track both east and west of said shops. 2. That said sidetracks, so extending to, through, and near said shops and other buildings, afford the means of running locomotive engines and cars from said main track into and out of the said shops and roundhouse and connect with the turntable, situate between said main track and said roundhouse, constructed and used for the purpose of turning engines. 3. That said sidetracks, so extending to said shops, roundhouse, and turntable, and the said turntable and buildings, are used by the plaintiff for changing its engines and cars, affording the means of necessary repairs, and also to en-

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Opinion of the Court—Hays, C. J.

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able the plaintiff to supply its engines with coal from a large coal platform situated west of and near to said shops, and on either side of which there is one of said tracks extending to and near said shops and other buildings. 4. That said shops, roundhouse, turntable, and tracks leading thereto, are used by the said plaintiff exclusively with, and in connection with, the operation of its said railway, and are necessary for such operation, but are not used for the purpose of running trains over the same, or for the transaction of its business as a common carrier." The injunction prayed for was granted, and an appeal taken to this court.

We are now called upon to construe the statute above quoted, so far as it relates to this action. In construing statutes of this nature, Judge Cooley, in his very excellent work on taxation, says: "The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it; and that when found it should be made to govern not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review. Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent, but the legislature must be understood to intend what is plainly expressed; and nothing then remains but to give the intent effect." (Cooley on Taxation, 2d ed., 264.) We fully approve the above rule of construction. It is contended by respondent that a statute almost identical with ours has been construed by the supreme court of the United States in *Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. Rep. 601. If such was the case, we would follow the construction placed upon it by that court, implicitly. After a careful examination of that case, we do not so understand it. There the territorial board of equalization had assessed the right of way, as it was clearly their duty to do; but the city authorities, disregarding such assessment, sought by virtue of their corporate power to assess the same property, and the question there litigated was as to which assessment was correct. The court there holds in favor of the assessment by the territorial board of equalization. We do not understand that the question in the suit at bar was litigated in that case. We presume that all of the machine-shops and other buildings there

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assessed were upon the right of way, otherwise the territorial board would not have assessed them. The respondent contends, however, that notwithstanding the property described in the complaint herein is not upon any of the lands obtained by congressional grant, and is more than one hundred feet from the center line of said road, yet, because said machine-shops, repair-shops, etc., are connected with the main track of their road by switches and sidetracks, that therefore the land upon which they stand all becomes right of way, and should be assessed as such, and, in support of this claim, cites us to *Keener v. Railway Co.*, 31 Fed. 126; *Pfaff v. Railway Co.*, 108 Ind. 144, 9 N. E. 93; *Railway Co. v. Goar*, 118 Ill. 134, 8 N. E. 682. In the first case the court says: "The term 'right of way' has a twofold signification. It sometimes is used to mean the mere intangible right to cross—a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed." They there only determine how it is used in their statute, and how the term is to be construed under the facts in that case. In the last two cases cited, the courts hold, in substance, that, under the revenue laws of their respective states, the term "railroad track" includes lands occupied by a railroad company with its main track, sidetracks, depot, roundhouses, coal sheds, and water-tanks. The reason for so holding is because they are so designated by their statutes. Hence, they give us no light, except perhaps to impress upon our minds the necessity of looking to our own statutes to ascertain the true legislative intent. If the position taken by respondent is correct, then, as a sequence therefrom, we must give no force or effect to that portion of the legislative enactment which provides that the territorial board shall not assess any machine or repair shops not situate on said right of way, but that it shall be the duty of the assessor to assess the same—unless we further find that the legislature presumed that the railroad company would have machine and repair shops which would not be connected with the main track by some kind of a railroad track. It is our duty to give force and effect to all parts of the enactment, where we can. It follows, we think, that the legislature intended that where the railroad owned machine and repair shops, or other buildings, not situate on that strip of land desig-



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nated by the act of Congress as a right of way, or where they owned other grounds than the right of way, that the assessor should assess the same, and that it should not be assessed by the territorial board. Of course, if the railroad company had obtained the strip of land two hundred feet wide, or less, for constructing its main line or buildings thereon, through private property, it would still be "right of way," and assessed, with buildings thereon, by the territorial board. We do not think that the legislature expected the railroad company to have machine-shops and repair-shops without having a track to connect the same with the main line; and when they enacted that the territorial board "shall not assess the value of any machine-shop or repair shop or other buildings not situate on said right of way or grounds or other real estate of any corporation or company within this territory, but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops or other buildings or grounds or other real estate is situated to assess the same," their intent seems plain, and that, under the facts of this case, we must therefore hold it was the duty of this appellant to assess the property in controversy. It has been ably argued that it would be better that the territorial board should assess all railroad property. Conceding such to be the case, that argument should be addressed to the legislature rather than the court; for it is not our province to pass upon the wisdom of the enactment, but rather to give effect to the legislative intent.

For the reasons before given we think the judgment of the district court should be reversed. It is so ordered.

Buck and Broderick, JJ., concurring.

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Argument for Appellant.

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(February 20, 1888.)

## JOHNSON v. FRASER ET AL.

[18 Pac. 48.]

**PRACTICE—INSTRUCTION TO JURY.**—When a court instructs a jury upon what state of facts they must find a verdict for either party, the instructions should include all the facts in the controversy material to the rights of the parties.

**SAME—INSTRUCTIONS PROPERLY REFUSED.**—Instructions asked are properly refused when they are not based upon some evidence material to the controversy, although as abstract principles of law they are correct.

**CLAIM AND DELIVERY—FINDINGS.**—In an action of claim and delivery a general verdict, finding for or against either party is sufficient to enable the court to enter judgment thereon for the return of the property when such return is the appropriate remedy. In such actions, where several articles are sought to be recovered, if either party desires a finding of value of each article, they should request that such findings be made, or he cannot take advantage of their failure to do so.

**JUDGMENT—CLAIM AND DELIVERY.**—The judgment of the court in an action of claim and delivery, where verdict is given for defendant, should be in the alternative for the return of the property, or its value if a return cannot be had. Where such return is the appropriate remedy, the verdict need not be in the alternative.

**FINDING AS TO RETURN OF PROPERTY.**—In such cases if either party desire a finding for a return of the property, he should request such finding. If he fail to do so he cannot take advantage of such failure.

(Syllabus by the court.)

APPEAL from District Court, Custer County.

Charles A. Wood, for Appellant.

The verdict in claim and delivery should be in the alternative, either for the delivery of the property to the respondents, or, in case delivery could not be had, for the value thereof, with damages for its detention. (Code, sec. 387; *Norcross v. Nunan*, 61 Cal. 640; *Holmberg v. Hendy* (Cal.), 10 Pac. 394.)

J. T. Morgan, for Respondents.

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The plaintiff, having sold the goods at public auction to different parties, will not be heard to complain that he is not given an opportunity to do that which he has put it out of his power to do. (*Flagg v. Tyler*, 6 Mass. 33.) If the verdict is sufficient in substance, the fact that it is defective in form will not invalidate it. (*Coit v. Waples*, 1 Minn. 134 (Gill. 110). If the court should be of opinion that the verdict covers all the issues, and that the judgment should be in the alternative, then this court should not order a new trial, but should correct the judgment. (*Berson v. Nunan*, 63 Cal. 552; *Matlock v. Straughn*, 21 Ind. 128; *Freeborn v. Norcross*, 49 Cal. 313.) When the property cannot be returned, the defendant is entitled to recover the value of the property, with interest, during the period of detention. (*Booth v. Ableman*, 20 Wis. 602; 2 Field's Lawyer's Briefs, sec. 512.)

BUCK, J.—This is an action of claim and delivery, brought by the administrator of the estate of Harry Melrose for certain personal property claimed as a part of said estate. The defendants allege as a defense that they were partners of the deceased at the time of his death; that the property was partnership property, in which each is a one-third owner, and, as surviving partners, they are entitled to the possession thereof as such owners, and for the purpose of settling the estate. The action was tried at the June term of the district court, 1887, Custer county, third judicial district, and comes into this court on a statement of the case on appeal from the order of the court overruling a motion for a new trial. The appellant specifies the refusal of the court to give the second, third, fourth, eighth, and ninth instructions to the jury, requested by plaintiff, and the giving of the first instruction asked by the defendants, as error of the court, and also error in the verdict, in that it is contrary to law, (1) because it is not in the alternative; and (2) because interest can only be allowed by way of damages.

The instructions asked by plaintiff, and refused by the court, are as follows: "No. 2. Unless the jury find from the evidence that a partnership existed, at the time of the death of Melrose, between Melrose, Fraser, and Doherty, of the kind and nature testified to by Fraser and Doherty, they will find for the plain-

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tiff; 3. If the jury should find from the evidence that, at the time of the death of Melrose, only an agreement of partnership existed between these parties, to take effect at some future time, they will find for the plaintiff; 4. Even if the jury should find from the evidence that Fraser had furnished Melrose the large amount of money he claims, or any other sum, still, if no actual partnership existed between the three parties at the time of the death of Melrose, the plaintiff must recover." These three instructions may properly be considered together. In *Deasey v. Thurman*, 1 Idaho, 775, it was held that, "when the court instructs a jury upon what state of facts they must find a verdict for or against either party, the instructions should include all the facts in the controversy material to the rights of the parties upon the claim of the plaintiff or the defense of the defendant." In an action of claim and delivery, the plaintiff must establish, as the foundation of his claim, either absolute ownership of the property, or his right to the possession thereof through some special interest in it. In this action the plaintiff alleges ownership in the property claimed, which is denied in the answer. It is not enough, therefore, for the jury to find that certain facts are established which, in connection with ownership, would establish plaintiff's right, but they must also find that the intestate was the owner, and of this the plaintiff has the burden of the proof. The instructions asked for make no reference to said ownership, and the ruling of the court thereon is sustained by the authority above cited. (*Gallagher v. Williamson*, 23 Cal. 334, 83 Am. Dec. 114.)

The eighth instruction asked by plaintiff, and refused, is as follows: "If the jury believe from the evidence that plaintiff acted on the representations of defendants that they made no claim to this property in taking possession of the same as special administrator of the estate of Harry Melrose, deceased, that he will be allowed out of said property all the expenses properly incurred by him in the management of said estate, as shown by the evidence, until he was properly notified of the claim of defendants to said estate." This instruction seems to be responsive to certain evidence tending to show that, soon after the death of the intestate, the defendants represented to the plaintiff that they had no claim to the property in dispute, in con-

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sequence of which statements the plaintiff took the same into his possession as special administrator, and afterward returned it to defendants on their claiming the same. This is an entirely different matter than that set up in the complaint, not being declared on as a cause of action in the complaint, nor could it have been joined with it, and cannot be adjudicated in this action.

The ninth instruction asked by plaintiff, and refused, is as follows: "If the jury believe from the evidence that Fraser furnished Melrose all the money necessary to purchase and pay for the property in dispute, that fact alone can be no defense to this action. Without some special contract between them alleged and proven, Fraser can only be regarded as a creditor of the estate." While this instruction is correct as an abstract principle of law, yet an inspection of the evidence shows that there is no foundation for the claim that the money was loaned to Melrose. The evidence shows that, if furnished at all, it was furnished to the partnership. Hence, we think it was properly refused as misleading.

The first instruction given by request of defendant, and accepted to by plaintiff, is as follows: "If the jury believe from the evidence that the defendant, William J. Fraser, furnished the money for the purchase of the property in dispute under an agreement of partnership between Fraser, Melrose and Doherty, and that said property was so held by them at the time of the death of Melrose, then the jury should find for the defendants." The appellant urges that this instruction is misleading, in that an agreement for a partnership at some future time is not an actual partnership, nor would it give a right of possession to such property to the survivors. We think the construction claimed by appellant for this instruction is not the true one. If an agreement of partnership was consummated, and the money furnished under it, it is a fair presumption that the agreement was *in praesenti*, unless the contrary appears, and we think the right of possession to the property was in the surviving partners for the purpose of settling the estate. (Rev. Stats., sec. 5554.)

The objection to the third instruction given at request of defendants is sufficiently considered in our discussion of the eighth instruction requested by defendants.

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The appellant urges two objections to the verdict of the jury, and these objections seem the most important questions on this appeal. The first objection is that "it should have been in the alternative, either for the delivery of the property to the respondents, or, in case delivery could not be had, for the value thereof, with damages for its detention." The verdict is as follows: "We, the jury, find for the defendants, and we find the value of the property at the time of the taking to be \$2,226.88. We find the interest thereon, at ten per cent per annum from the date of the taking to the present time, to be \$334.03. We assess the damages of defendants at five cents." Section 4399 of our Code of Civil Procedure provides that "in an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to the return thereof, and, if so instructed, the value of specific portions thereof, may at the same time assess the damages, if they are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property." In the case at bar, the property had been delivered to the plaintiff. The defendant demands the recovery thereof, and the verdict of the jury finds its gross value. It does not, however, find the value of the several articles of property, or that the defendant is entitled to the return thereof in terms. The appellant urges that the failure to find the value of the several articles, and also as to whether the defendant is entitled to said return, is error which should give him a new trial. An inspection of the provision of the statute shows that the law requires that the value of specific portions be found only when the instructions of the court require the jury to do so. This provision undoubtedly places the finding of the value of specific articles within the discretion of the court. The court may require it, or dispense with it, according to the circumstances of the case as shown by the evidence. If either party desire it, they ought to request that the jury be instructed so to find. If they fail to do so, they ought not to be allowed to take advantage of it on appeal.

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The appellant makes the point that it is error in the verdict that the jury did not find whether or not the property should be returned to the defendant. It is difficult to understand why the jury should find upon that matter at all. If they find as a fact that the property belongs to the defendants, the law will adjudge that it will be returned to them unless some substantial reason be shown why it cannot be done. (Wells on Replevin, secs. 753, 754; *Waldman v. Broder*, 10 Cal. 378; *Underwood v. White*, 45 Ill. 437.) In the latter case the court says, if the verdict is for the defendant, no reason is perceived why he should not be restored to the possession of the property of which he had been wrongfully deprived. Section 4471 of our Code of Civil Procedure provides that, "in the execution for the delivery of personal property, it must require the sheriff to deliver possession of the same to the person entitled thereto, and at the same time require the sheriff to satisfy any costs and damages recovered by the judgment out of the personal property of the person against whom it is rendered." Under this statute the plaintiff does not have the option to return or pay for the property as he may elect. It must be returned *in specie*, if it can be done; and, if it cannot be so returned, he must pay the value thereof. The statute does not in terms say that the jury must find whether or not the property must be returned. It declares: "If, finding for defendant, they also find for the return thereof, they must also find the value." But under what circumstances they must find for the return is not specified. It is possible that the party having taken the property in consequence of its loss or other cause may not be able to return it, and that he may desire a finding by the jury to that effect. If so, we think he ought to request such a finding; and, if he fails to do so, he cannot complain. Section 4395 provides "that when the verdict is announced, if it is informal or insufficient in not covering the issues submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." If the objection is not made at the time the verdict is received, it is too late to do so afterward. The statute, indeed, saves an exception to the verdict, but it is to the verdict as it is received; and, if it is sufficient to sustain a judgment, it will not be disturbed. Section 4396 declares that verdicts

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are either general, which pronounce upon all or any of the issues; or special, by which the jury find only the facts, leaving the judgment to the court. In this case the verdict is general, pronouncing upon all of the issues in the case. Section 4453 provides that, in an action to recover the possession of personal property, "if the property has been delivered to the plaintiff, and the defendant demand a return thereof [which is the case at bar], judgment may be for a return thereof, or for its value in case return cannot be had." It will be observed that the provision requiring judgment for the return is not mandatory. The language is that judgment may be entered for a return. This would seem to give the court a discretion to omit in the judgment an order for its return under certain circumstances where the substantial rights of both parties could be subserved thereby. In *Brown v. Johnson*, 45 Cal. 76, the court had entered judgment for the value and damages, without any direction for the return thereof. On appeal the judgment was sustained; the court holding "that in support of such a judgment, where the record discloses nothing on the point, they will intend that the facts actually appearing below were such as to warrant its rendition." This authority would indicate that, in rendering judgment, the court would look to the evidence to determine whether the return of the property should be adjudged to the party. If this is correct, the finding of a jury as to a return thereof seems of little value in determining the rights of the party, unless, indeed, they should make a finding as to the actual *status* of the property, and thus give the court a finding upon all the facts necessary to the entry of a judgment. We think the verdict sufficient to enable the court to enter the proper judgment, under the authorities cited. (See, also, *Wells on Replevin*, sec. 509; *Waldman v. Broder*, *supra*; *Glann v. Younglove*, 27 Barb. 480; *Coit v. Waples*, 1 Minn. 134 (Gill. 110.)

It is further objected that the verdict is against law, because it finds both damages and interest. These are simply distinct findings of fact. Either may be omitted in entering judgment, or, if an erroneous judgment has already been entered, it may be corrected in the lower court, or, on appeal, the judgment may be reversed, and the cause remanded, with direction to enter a



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judgment for the amount, less the damages, under the authority of *Berson v. Nunan*, 63 Cal. 550; *Freeborn v. Norcross*, 49 Cal. 313.

The order of the court overruling the motion for a new trial is affirmed.

Hays, C. J., and Broderick, J., concurring.

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(February 20, 1888.)

MALAD VALLEY IRRIGATING COMPANY v. CAMPBELL.

[18 Pac. 52.]

**PRIOR APPROPRIATION OF WATER.**—Prior appropriation of all the waters of a stream applied to a useful purpose gives the better right to the tributaries and all the direct and immediate sources of supply of the stream, and when this right once vests it must be protected and upheld.

**SPRINGS—SOURCES OF SUPPLY.**—Rights cannot be acquired to the waters of springs situate along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out and thereby increasing the water supply, as against prior appropriators in good faith, of the whole of the waters of the stream.

**QUERY.—WHETHER ONE CAN** bring water from another independent source into a natural stream, whose waters have been appropriated, and use the channel of such stream to conduct the water thus brought into another point, to be there diverted and used. Suggested, but not decided.

(Syllabus by the court.)

APPEAL from District Court, Oneida County.

D. W. Standrod and J. T. Morgan, for Appellant.

He who first appropriates the water of a stream, and connects his labor therewith for a beneficial use, is entitled to the same against the world. (*Atchison v. Peterson*, 20 Wall. 507, 514 et seq.; *Basey v. Gallagher*, 20 Wall. 671, 682; *Tartar v. Mining Co.*, 5 Cal. 397; U. S. Rev. Stats., sec. 2339.) One who increases the flow of water in a stream by digging out

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springs, or turning in another stream may appropriate such increase to his own use. (*Keeney v. Carillo*, 2 N. Mex. 490; *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769; *Burnett v. Whitesides*, 15 Cal. 35; Idaho Rev. Laws, sec. 3158.) Adverse user of water stands upon the same footing as that respecting the adverse user of land, and the reasoning which will sustain the one will likewise uphold the other. (*Vansickle v. Haines*, 7 Nev. 250; *Crandall v. Woods*, 8 Cal. 144.)

Smith & Smith, for Respondent.

Where a person has conducted some water to a stream, he will be restrained, at the suit of the owner of the water of the stream, unless the former can show that he has not diverted more water from it than he led to it. (*Budd v. Railway Co.*, 15 Or. 404, 15 Pac. 654; *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. 108.) This general right over the stream of the party who has perfected a prior appropriation is that the water of the stream should continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of his ditch, or to the point where his own actual dominion over it commences, to the extent or amount of his appropriation, without diversion or material interruption. (*Pomeroy's Riparian Rights*, Black's ed., sec. 60; *Lower Kings River etc. Ditch Co. v. Kings River etc. Canal Co.*, 60 Cal. 408; *Lorenz v. Jacobs* (Cal.), 3 Pac. 654; *Mining Co. v. Hoyt*, 57 Cal. 44; *Barnes v. Sabron*, 10 Nev. 217; *Water Co. v. Fletcher*, 23 Cal. 481; *James v. Williams*, 31 Cal. 211; *Feliz v. City of Los Angeles*, 58 Cal. 73.)

BRODERICK, J.—This action was brought by the Malad Valley Irrigating Company against Nephi Campbell, in the district court in and for Oneida county, to determine the right to the possession and use of the waters of a certain stream in said county, known as "Campbell creek," and to restrain the defendant from diverting or interfering with the use and enjoyment of the same. The complaint alleges that the plaintiff is a corporation, and is the owner of and entitled to the control and use of all the waters of a certain stream known as "Devil creek," situated in said county, together with all its tributaries; that it and its predecessors in interest have for a long number

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of years owned, controlled, used, and enjoyed said waters, and peaceably distributed the same among the farmers and residents along said stream for the irrigation of agricultural crops. It is further alleged "that the defendant on or about the first day of June, 1885, wrongfully and unlawfully, and without color of right or title, without the consent of plaintiff, and against its will, did enter upon one of the tributaries of said Devil creek, to wit, the stream known as 'Campbell creek,' and which enters said Devil creek on the premises of the defendant, and did wrongfully and unlawfully construct certain dams, ditches, and flumes, and did divert the whole of the waters of said Campbell creek, and has ever since continued to divert said waters, and that plaintiff, by said wrongful acts of the defendant, has been, during the whole of said time, deprived of the use of all the waters of said stream, to the great and irreparable injury of this plaintiff." The defendant answered, specifically denying the allegations of the complaint; and, as a further defense, alleges that in the year 1877 he went upon the stream known as "Campbell creek," and appropriated all the waters of said creek, by constructing dams, cleaning and digging out springs, clearing brush, and diverting the whole of said waters from their natural channel, and using the same for the purpose of agriculture, etc.; that, at the time the whole of said stream ran to waste, and was entirely unappropriated; that, since the appropriation of said waters in the year last aforesaid, this defendant has continuously used said waters for the purpose of irrigating his crops. The defendant then pleads in bar the statute of limitations. At the November, 1886, term of said court, the cause was tried without a jury, and the following are the findings of fact and conclusions of law made and filed therein: "1. It is found that the plaintiff and its predecessors in interest have for about twenty years used and enjoyed the waters of the stream known as 'Devil creek,' in Oneida county, Idaho, for the irrigation of agricultural crops; 2. That plaintiff was incorporated in April, 1882; all parties owning water rights in Devil creek, including the defendant, joining in such corporation; 3. That Campbell creek is a tributary of Devil creek, entering said stream above the dam at which plaintiff's grantors originally appropriated the

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waters of Devil creek; 4. That for the last three years the defendant has, at times, set up some claim to the right to the exclusive use of Campbell creek, but that previous to that time it has been used by and controlled by plaintiff and its grantors; that plaintiff and its grantors have never relinquished their claim to the use of the waters of said stream." As conclusions of law, it is found: "1. That plaintiff is the owner and is entitled to the free use and control of all the waters of the stream known as 'Campbell creek'; 2. That the defendant ought to be forever enjoined from using or in any way interfering with the waters of said Campbell creek, except under the license and permission of plaintiff. And it is ordered that judgment be entered accordingly." Judgment was thereupon entered, giving to the plaintiff the free use and control of the waters of Campbell creek. An application was made for a new trial, which was denied, and from the judgment and the order overruling the motion for new trial the defendant appealed, and assigns as error: 1. That the fourth finding of the court is unsupported by the evidence, and that the findings are against law.

We will consider these questions together. Whatever conflict there may seem to be in the adjudged cases in this country relating to the subject of water rights, the law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld. The legislative will is clearly expressed in the following language: "As between appropriators, the one first in time is the first in right." (Idaho Rev. Stats., sec. 3159. See, also, *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, 20 Wall. 670.) It will be observed from the answer in this case that the defendant does not claim to have brought any water into Campbell creek from an independent source, by reason whereof he is entitled to the use of the channel of the stream to conduct the waters, thus brought in, to his branch, so as to invoke the principle enunciated in *Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769. Nor is it alleged that the defendant improved the channel and sources of supply, and thereby increased the flow of the waters in the stream, and that he is entitled to such increased flow. The allegation is "that in 1877

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he went upon the stream now known as 'Campbell creek,' and appropriated all the waters of said creek by constructing dams, cleaning and digging out springs, clearing brush, and diverting the whole of said waters from their natural channel, and using the same for the irrigation of agricultural crops." It is further alleged that, when the defendant entered upon this work, the whole of the stream was unappropriated; and hence the question of the first appropriation of the waters of the stream was a material issue, and the one upon which the decision of the case turned. The fourth finding was responsive to this issue, and there is evidence in the transcript to support it. It is true, the defendant testified that by his labor in cleaning out springs, etc., he increased the flow of the water in the stream, but there is no predicate in the pleadings for this evidence. Had the pleadings justified the introduction of this testimony, it could not have warranted a different judgment from the one rendered. It is considered that Campbell creek has had a well-defined channel for more than twenty years, and that it is a tributary of Devil creek. The court found, in substance, that the plaintiff and its predecessors in interest had used and enjoyed the whole of the waters of Devil creek for about twenty years last past for the irrigation of agricultural crops. Campbell creek, being a tributary of Devil creek, was appropriated long before the defendant attempted to exercise any control over it, and the court so finds. The testimony all tends to show that the springs cleaned out by the defendant were along and in the immediate vicinity of Campbell creek, and that these springs constituted the principal and immediate sources of supply for the stream. If persons can go upon the tributaries of streams whose waters have all been appropriated and applied to a useful and legitimate purpose, and can take and control the waters of such tributaries, then, indeed, the sources of supply of all appropriated natural streams may be entirely cut off, and turned away from the first and rightful appropriators. To allow this to be done would disturb substantial vested rights, and the law will not permit it. We are of opinion, therefore, that the findings are not obnoxious to the objections urged against them. (*Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.) We do not wish to be understood as deciding that one cannot bring water from

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other or foreign sources into a natural stream, whose waters have been appropriated, and use the channel of such stream to convey the water, thus brought and emptied in, to another point, to be there diverted and used. This question is not now before us, and it will be time to decide it when presented. (See, as to this point, *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. 108; *Burnett v. Whitesides*, 15 Cal. 35.) The judgment of the court below is affirmed.

Hays, C. J., and Buck, J., concurring.

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(February 20, 1888.)

CURTIS v. WALLING.

[18 Pac. 54.]

**MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE NOT GROUND TO JUSTIFY.**—Insufficiency of the evidence to justify the judgment, and objections to the judgment as being contrary to law, are not grounds upon which a motion for a new trial can be granted.

**CONCLUSIONS OF LAW—AMENDING—FINDING OF FACTS.**—It is not error for the court to amend its conclusions of law after they are filed and before entering judgment, or to vacate an order directing judgment to be entered for a certain amount, and thereafter render judgment for a different amount when the findings of fact warrant it.

**VOLUNTARY APPEARANCE—WAIVER.**—Voluntary appearance of attorney and participation in the argument of a motion waives notice of such motion.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

D. P. B. Pride, for Appellant.

After findings are filed, they cannot be reversed or different findings substituted. (*Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427, and note; Hayne on New Trial and Appeal, sec. 247.) After the report of the referee had been approved by the court, and judgment had been entered up accordingly, it was too late

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to amend the findings. (*Pico v. Sepulveda*, 66 Cal. 336, 5 Pac. 515.) A judgment which is not what it should have been can be reformed only in a direct proceeding brought for that purpose. (*Hobbs v. Duff*, 43 Cal. 485.) When a judgment-roll contains defective findings, a motion for a new trial is proper. (*Knight v. Roche*, 56 Cal. 15; *Soto v. Irvine*, 60 Cal. 436; *Brown v. Burbank*, 59 Cal. 535; *Warner v. Holman*, 24 Cal. 228; *Lucas v. San Francisco*, 28 Cal. 591.)

R. Z. Johnson and Huston & Gray, for Respondent.

During the term of court the records and judgment are within the control of the court, and may be altered, revised, revoked or amended. (Freeman on Judgments, secs. 69-71, 90, 93; *De Castro v. Richardson*, 25 Cal. 49; *Doss v. Tyack*, 14 How. 297; *Bell v. Thompson*, 19 Cal. 706; *Goddard v. Ordway*, 101 U. S. 752.) Amendments may be made at any time, the data being in the record to amend by. (Freeman on Judgments, sec. 72; *State v. Hurlstone*, 92 Mo. 327, 5 S. W. 38; *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. 116; *Beatty v. Dixon*, 56 Cal. 619; *Swain v. Naglee*, 19 Cal. 127; *Solomon v. Fuller*, 14 Nev. 63; *Sheldon v. Gunn*, 57 Cal. 40.) It was proper for the court to disregard the erroneous conclusions of the referee, and render the proper judgment in place of a judgment founded on the report. (*Sartor v. Strassheim*, 8 Colo. 185, 6 Pac. 215; *Calderwood v. Pyser*, 31 Cal. 337; *State v. Hurlstone*, 92 Mo. 327, 5 S. W. 38; *Bixby v. Bent*, 59 Cal. 531.) A party who appears and contests a motion cannot object, on appeal, that no notice of motion was served on him. (Wade on Notice, secs. 1203, 1189; *Reynolds v. Harris*, 14 Cal. 677, 76 Am. Dec. 459; *Williams v. Miller*, 1 Wash. Ter. 88; *Ex parte Cottrell*, 59 Cal. 419.)

BUCK, J.—This is a suit in equity, brought by the plaintiff, claiming to be a cotenant in a certain water ditch, and praying for an accounting by his cotenant, the defendant. It was tried at the April term, 1887, of the district court in Ada county, second judicial district, and a decree entered adjudging the plaintiff to be the owner of one-fifth of said ditch. At the same term Jonas W. Brown was appointed referee to take an accounting between the plaintiff and defendant, and report

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his findings of fact and conclusions of law. At the October term, 1887, the report of the referee was filed and approved, and it was ordered that judgment be entered in accordance therewith for the sum of \$1,127.45. On the same day, to wit, October 1, 1887, the plaintiff made a motion that the judgment herein be set aside, and the report of the referee herein be amended by setting aside the conclusions of law, and render judgment upon the facts reported; and thereupon the court ordered that the conclusions of law herein, and the order for judgment heretofore entered, be set aside, and judgment be, and is hereby, entered upon the findings of fact of the referee for plaintiff, and against defendant, for the sum of \$1,382.22. The cause comes into this court on appeal from the said judgment, and from the order of the court overruling the motion for a new trial. The errors assigned in appellant's brief are:

1. That the court erred in overruling the motion for a new trial;
2. That it was error in the court, after having approved the report of the referee, and judgment having been entered up accordingly by the clerk for \$1,127.45 and costs, to set the same aside, and enter a new judgment for the sum of \$1,382.22 and costs;
3. That the court erred in setting aside said judgment, and ordering the report of the referee to be amended by setting aside the conclusions of law, inasmuch as there was no legal service of order upon defendant to show cause;
5. That the judgment is not supported by the findings. The fourth suggestion of error by appellant is that the proper relief of plaintiff from the judgment of \$1,127.45 which he claims was first entered was a motion for a new trial. This will be disposed of in the consideration of the other specifications of error.

The motion for a new trial was based on the following specifications of error: 1. That the evidence does not support the judgment; 2. That the judgment is contrary to law. Neither of these objections can be considered on a motion for a new trial, and the motion was properly overruled. (Hayne on New Trial and Appeal, sec. 96; *Martin v. Matfield*, 49 Cal. 42; Code Civ. Proc., sec. 4439.)

The second assignment of error seems at variance with the record in its recital of facts. The judgment-roll shows but one judgment in the case. Prior to the entry of such judg-



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ment, the court had made an order that the report of the referee be approved, and that judgment be entered in accordance therewith for the sum of \$1,127.45. This was simply a direction to the clerk to enter judgment, but did not constitute a judgment. Afterward, on the same day, the court made a second order that the conclusions of law therein, and the order for judgment heretofore entered, be set aside, and that judgment be, and is hereby, entered upon the findings of fact of the referee for plaintiff, and against the defendant, for \$1,382.22. That part of appellant's argument upon the power of a court to amend its findings cannot be considered, for the reason that the record fails to show that the findings were amended after judgment was entered.

The point is made that the order setting aside the conclusions of law of the referee, and for entry of judgment first made, was error, because no notice of said motion was served upon the attorney of defendant. The record shows, as recited in such order, that the attorney for defendant appeared and contested such order. Such appearance, unless made specially, would constitute a waiver of notice, if one was necessary; and this objection is therefore without merit. (Wade on Notice, secs. 1189-1204; *Reynolds v. Harris*, 14 Cal. 677, 76 Am. Dec. 459.)

The last objection urged by the appellant is that the judgment is not supported by the findings. The findings of fact of the referee, and conclusions of law, were adopted by the court. The order of the court was not that the findings of fact be changed, but that the order, so far as it affected the conclusions of law, be set aside. (Hayne on New Trial and Appeal, secs. 243-247; *Bixby v. Bent*, 59 Cal. 532.) We think the court had authority to change its conclusions of law and that there was no error in doing so. The judgment is affirmed.

Hays, C. J., and Broderick, J., concurring.

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(February 27, 1888.)

**BACK v. SIERRA NEVADA CONSOLIDATED MINING COMPANY.**

[17 Pac. 83.]

**MINING TUNNEL—RIGHTS OF LOCATOR—CLAIMS LOCATED ON LINE OF TUNNEL—DILIGENCE OF TUNNEL OWNER.**—A tunnel located and run for the development of veins or lodes, pursuant to the provisions of section 2323 of the Revised Statutes of the United States, becomes a mining claim, and entitles the owner thereof to make an adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence, such tunnel owner is entitled to proceed under the provisions of section 2326 of the Revised Statutes of the United States.

(Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.**W. B. Heyburn, for Appellant.**

Persons rightfully in possession of the surface are adverse claimants, and have an adverse claim, within the meaning of the law, and are entitled to be heard in the local courts before patent is issued. (*Shafer v. Constans*, 3 Mont. 369, 1 Morr. Min. Rep. 149.)

**F. Ganahl and Albert Hagan, for Respondent.**

Since the passage of the act of 1872 the location of a mining claim, or rather of a lode mining claim, is the location of a piece of land with all the veins it may contain. (*Gleeson v. Mining Co.*, 13 Nev. 442, and cases cited; 9 Morr. Min. Rep., tit. "Location," p. 429 et seq.) There is no provision of law for patenting tunnel locations, but such lodes as are discovered in running a tunnel may be patented with a full compliance with the law. (Week's Mineral Lands, p. 112, sec. 65.)

**HAYS, C. J.**—This is an appeal from the judgment of the district court of the first judicial district of Idaho territory, in and for Shoshone county, rendered on failure of plaintiff to amend the complaint after demurrer thereto was sustained, the plaintiff having elected to stand on the complaint as filed.

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The action is one brought in support of an adverse claim filed in the United States land office against the issuance of a patent for the Sierra Nevada lode mining claim, said adverse claim being made on behalf of the Pilgrim tunnel location made under the provisions of section 2323 of the Revised Statutes of the United States. At the time of filing the adverse claim and the complaint in this action, the Sierra Nevada lode mining claim was owned by the respondent, a corporation, and the said tunnel location was owned by the appellant. During the period of publication of the application of the Sierra Nevada claim the appellant filed an adverse claim, accompanied by a map made from actual survey, showing the relative position of the said mining claim and tunnel location, in the United States land office in the district in which said claims were situated, and in which application for patent of said claim was filed, and said adverse claim was duly allowed by the register of said land office, and within thirty days after so filing said adverse claim appellant filed his complaint in an action brought in support thereof in the district court aforesaid. Respondent appeared and demurred to said complaint on the grounds hereinafter stated.

Appellant in his complaint alleges that one Phillip Kirby, a citizen of the United States, on April 5, 1886, located a tunnel site under the provisions of section 2323 of the Revised Statutes of the United States, three thousand feet in length, in the Yreka mining district, Shoshone county, Idaho territory, and that at the time of making such location he marked the line thereof by planting posts at every one hundred feet along the said line, each post being plainly marked "Pilgrim Tunnel Line," and that he posted a notice of the location of said tunnel at the face thereof; that he had cut out trails to said tunnel, three miles in length, and had cut out said tunnel six feet wide and six feet high, and run the same four feet under cover, prior to said location and during said month of April; that on April 12, 1886, said Kirby appeared before the recorder of the mining district in which said tunnel was located, and made the affidavit required by the regulation of the general land office, and the same was duly attached to a copy of the notice of location posted at the face of said tunnel, and said copy of notice

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and affidavit were on said twelfth day of April, 1886, filed in the office of said recorder, and have there remained; and said notice and affidavit were afterward, on the sixteenth day of April, 1886, recorded in the office of the recorder of Shoshone county; that said Kirby and his grantee, the plaintiff, have continuously and diligently prosecuted the work of running said tunnel along the line as marked out ever since said fifth day of April, 1886; that at the time of making the location of said tunnel there were no known ledges existing or cropping along the course of said tunnel location as the same was located and marked on the ground; nor were there any known ledges that crossed said tunnel location in their course or trend; nor were there any ledges previously known to exist, or which crossed said tunnel location at the time of its location; that after said tunnel had been located as aforesaid, to wit, on April 6, 1886, defendant's grantors entered upon the line of said tunnel location, at a point where post No. 9 on said line was planted, and with full knowledge of the existence of said post, and the location of said tunnel, commenced to prospect for minerals, and in so prospecting sunk a shaft through the loose surface and slide earth and rock to a depth of twelve feet before entering upon any solid formation or rock in place; that at or near the place where the shaft was so sunk there was no lode or ledge of valuable mineral-bearing rock previously known to exist, nor did any such crop or show upon the surface of the ground; that at or about said depth of twelve feet in said shaft a ledge of valuable mineral-bearing rock was discovered by said grantors of defendant; that said discovery was made on and within the line of the said tunnel location while the same was being actively occupied and diligently worked; that said lode or ledge is, and was at the time of striking the same in said shaft, a blind lead or lode on the line of said tunnel; that the tunnel, on being continued in its present course on the located line thereof, would cut and intersect the said lode on its dip within the length and location of said tunnel; that said grantors of defendant located and recorded a mining claim based upon their said discovery, and called said claim the "Sierra Nevada"; that defendant, claiming to be the grantee of said locators, did on May 23, 1887, make application for

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United States patent for said claim, and filed its application for patent in the United States land office at Cœur d'Alene, Idaho, and afterward caused notice of said application to be published, as required by law, and during period of said publication the plaintiff filed a protest and adverse claim in said land office against the issuance of a patent for said claim on behalf of said tunnel location, and within thirty days after filing such protest and adverse claim commenced the action in the district court of the county in which said claim and tunnel location is situated; that the plaintiff was and is by virtue of certain conveyances duly made the grantee of Phillip Kirby, the locator of said tunnel location; that he is now, and intends to continue, diligently running said tunnel along the line of said tunnel site, and in the direction of said lode so discovered and called the "Sierra Nevada," for the purpose of intersecting and cutting the same, and that he intends, when the same shall have been so intersected, to locate the same according to the provisions of section 2323 of the Revised Statutes of the United States; that the ground upon which the discovery of the said lode was made by defendant's grantors was not vacant and unoccupied public mineral lands of the United States at the time of such discovery and location, and that such location was void; and prays the court to adjudge that the location of the Sierra Nevada mining claim was null and void. To which complaint the respondent demurred, and alleged as grounds of demurrer: "That the plaintiff herein has not legal capacity to sue in this action; that it does not appear from said complaint that the plaintiff has any right, interest or adverse claim upon which he can base an action against the Sierra Nevada Mining Company, by reason of its application for a patent herein; that he is not the owner of any lode, vein or surface ground, by location or otherwise, authorizing him to file any adverse claim herein, or to maintain any action upon any pretended adverse claim." "2. That the said complaint does not state facts sufficient to constitute a cause of action." It is contended that the court erred in sustaining the demurrer, and a reversal of the judgment entered therein is now asked.

We have the light of but few adjudicated cases to aid us in an investigation of this subject. We are satisfied, however, from an examination of the provisions of section 2323 of the

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Revised Statutes of the United States, that it was the intention of Congress that rights might be secured to all such as should run tunnels for the development of a vein or lode pursuant to its provisions, and to aid in securing such rights it was there enacted that "locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid." It seems evident from this enactment that Congress intended to withdraw from exploration for lodes not appearing on the surface so much of the public domain as lay upon the line of such tunnel and to reserve such for the benefit of the proprietor of the tunnel so long as he prosecuted work thereon with reasonable diligence, and to give to him the right of possession for this purpose. True, the act does not so state in direct terms, but this is the effect of its provisions, and any other construction would but imperfectly protect the rights of the proprietor of the tunnel. The rights of the tunnel locator being created by statutory enactment, the courts should be therefore clothed with power to protect such rights, and we are unable to see how they can be fully protected but by permitting such locator to avail himself of the provisions of section 2326. Doubtless it was the legislative will that he should have such privilege. Such being the case, we must hold that a tunnel location constitutes a mining claim within the meaning of the statute, as was held by Commissioner Kirkwood in his opinion of December 12, 1881 (Dec. Dep. Int. 594), and that it is such a claim as may be asserted and protected under the provisions of section 2326 of the Revised Statutes of the United States, and the act amendatory thereof. While this appellant would have no right under his complaint to have a patent issued to him since he does not claim to have discovered any vein or lode, yet we think he has the right of possession for prospecting purposes to the area in dispute, and to show that respondent's location was made upon the line of his tunnel. The act of March 3, 1881, provides what shall be done when neither party shows title to the ground in conflict.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings according to law.

Buck and Broderick, JJ., concur.

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Argument for Appellant.

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(February 27, 1888.)

## TERRITORY v. EVANS.

[17 Pac. 139.]

**INDICTMENT FOR MURDER, IF IT SUFFICIENTLY DESCRIBES CRIME,** WILL BE SUSTAINED.—In determining the offense charged in an indictment, all parts of the instrument will be considered together, and if from the whole it appears that a crime is sufficiently alleged, it will be sustained.

**INSTRUCTIONS REQUESTED.**—In criminal prosecutions, as in other actions, instructions to the jury must be based upon some evidence in the case. If they do not, when requested, they should be refused.

**SAME—IF GIVEN FOR MURDER IN FIRST DEGREE, WILL SUSTAIN VERDICT FOR SECOND DEGREE.**—An instruction to the jury, upon which defendant is convicted of murder in the second degree, though objectionable as defining murder in the first degree, is sufficient to sustain the verdict as found.

**REVIEWING INSTRUCTION—WHOLE CHARGE TO JURY WILL BE CONSIDERED.**—In reviewing alleged errors on appeal from a judgment in a criminal case, where objection is made to specific instructions, the entire charge will be considered together, and if it fairly and correctly presents the law bearing upon the issues tried, the appellate court will not disturb the judgment.

**PRESUMPTIONS.**—Presumptions are in favor of the decision of the court, and where a reversal of a judgment is sought on the ground of error, the ruling of the court will be sustained unless sufficient facts appear in the record to show that error was committed.

(Syllabus by the court.)

## APPEAL from District Court, Lemhi County.

Charles A. Wood, for Appellant.

When a known felony is attempted upon the person, be it to rob or kill, the party assaulted may repel force by force, and any person present may interpose to prevent mischief, and if death ensues, the party so interfering will be justified. In such cases nature and social duty co-operate. (*Commonwealth v. Selfridge*, Horr. & Thomp. 30; 1 Bishop's Criminal Law, sec. 851; *Pond v. People*, Horr. & Thomp. sec. 814; *Dill v. State*, Horr. & Thomp. sec. 738; Crimes and Punishment Act,

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Argument for Respondent.

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secs. 25, 30.) It is not necessary that the danger should be actual; simply apparent. (1 Bishop's Criminal Law, 305, and notes; Archibald's Criminal Law, 221; 1 Wharton's Criminal Law, 405, 488, 489; Crimes and Punishment Act, sec. 26; *Maher v. People*, Horr. & Thomp. 290.) Whatever a man may lawfully do in defending himself he may lawfully do in defending another. (*State v. Westfall*, 3 Am. Cr. Rep. 343.)

R. Z. Johnson, Attorney General, and James H. Hawley, for the Territory.

No person, even if an officer, is justified in taking life, unless the absolute necessity exists. No person can lawfully take life to prevent the commission of a misdemeanor, or to effect the capture or prevent the escape of one who has committed a misdemeanor. (2 Bishop's Criminal Law, 630 et seq.; 2 Wharton's Criminal Law, 1031.) If a person interferes in an affray with a view to keep the peace, and not to take any particular one's part, he may, if absolutely necessary, kill, in order to preserve his own life or that of a party thereto; but if he runs in, and takes the part of one party to the affray, it will be manslaughter. (1 Russell on Crimes, 898; 2 Wharton's Criminal Law, 1039; 1 East P. C. 291; 1 Hawkins' Pleas of the Crown, 98.) And if he interferes, and kills with malice, it will be murder. (Wharton on Homicide, 444.) Mere threats or abusive language will not justify an interference, nor, in case of death, will they reduce the crime from murder to manslaughter. (*Johnson v. State*, 27 Tex. 758; *Stoffer v. State*, Horr. & Thomp. 232.) If a defendant justifies on the ground that the act was necessarily committed in lawfully preserving the peace, as where he interferes to prevent A from taking the life of B, and to that end kills A, he must show, to establish a defense, not that he had reasonable ground to believe that the act was necessary, but that it was actually necessary, and that he had no other way to prevent the execution of the felony. (*People v. Cole*, 4 Park. Cr. Rep. 35.) Where the evidence shows the accused was not forced to take the life of deceased to save his own life or limb from serious peril, an instruction which ignores the excuse of self-defense is not erroneous. (*Taylor v. State*, 48 Ala. 180.) When there



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is no evidence of justification of a homicide, it is not error to tell the jury that the law of justification is not applicable. (*Parker v. State*, 31 Tex. 132.)

BUCK, J.—The defendant was indicted, tried and convicted of murder in the second degree, at the April term, 1888, of the district court, third judicial district, in the county of Lemhi, and comes into this court on an appeal from the judgment.

The first point made by appellant in his brief is that the indictment does not allege the crime of murder. The charging part of the indictment is as follows: "That the said Charles Evans, on the eleventh day of November, A. D. 1886, did unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, in and upon one James McKee, make an assault, and that the said Charles Evans a certain pistol then and there loaded with powder and leaden bullets, which said pistol he, the said Charles Evans, in his hands then and there had and held at and against the said James McKee, then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, did shoot off and discharge, and that the said Charles Evans, with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol so loaded, to, at, and against the said James McKee, as aforesaid, did then and there unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, strike, penetrate, and wound the said James McKee, giving him, the said James McKee, as aforesaid, one mortal wound, of which mortal wound the said James McKee did die. And so the jurors aforesaid, upon their oaths aforesaid, do charge and say that the said Charles Evans the said James McKee, in manner and form aforesaid, then and there, unlawfully, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought did kill and murder," etc. The felonious and malicious intent herein charged in terms qualifies and characterizes the striking, penetrating, and wounding of the deceased, McKee, and does not in terms charge that the wound was intentionally and feloniously mortal.

The appellant, in his brief, urges the proposition that "under our statute there must be an intention to kill, or the crime

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will not be murder.” Under our Penal Code, as it existed in April, 1887, the time when the indictment was found (Revised Laws, 323, sec. 15), murder was the unlawful killing of a human being with malice aforethought, either express or implied. Section 21 of the same statute, page 324, provides also: “That involuntary manslaughter shall consist in the killing of a human being without any intent to do so,” etc, “provided, that when such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.” The indictment in the case at bar charges the wounding, striking, and penetrating of James McKee with leaden bullets, and with malice aforethought, of which wound the said McKee died. The wounding is charged to be with felonious intent, and, if so, the killing, under the statute referred to, is murder, even without the intent to kill. It is, however, urged by appellant that the indictment does not charge murder. The books contain various statements as to how an indictment should be drawn, and different authors divide it into different parts. Our statute (section 7632) defines it to be: “An accusation in writing presented by a grand jury to a competent court, charging a person with a public offense,” and provides that it must contain: “1. The title of the action—specifying the name of the court and the names of the parties; and 2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.” If this is done, the defendant cannot complain. The order in which it is done is not one of the essential elements of the indictment. It is claimed by appellant that the averments in what is often designated as the “conclusions” of the indictment cannot be construed in connection with the allegations in the charging part. That portion of the indictment known as the “conclusions” is not necessary, and is placed there or not, as the taste of the pleader may dictate. We think, when it is used, it may reasonably be construed with the other portions of the indictment. This, we think, is the general understanding of grand juries. The

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indictment, construed together, charges the crime of murder in the second degree, under the adjudications of this court, in *People v. O'Callaghan*, ante, p. 156, 9 Pac. 414; and we see no reason for changing that decision.

The other specifications of error urged by appellant are to the instructions of the court given, and to those requested and refused. There were seven instructions asked by defendant and refused, to which refusal exceptions were taken. Of these the fourth is disposed of by our ruling on the sufficiency of the indictment. The third, sixth and seventh are based upon threats claimed to have been known to defendant, and to knowledge of the character of the parties Lyon and McKee, and to a certain assault alleged to have been made upon the witness Lyon upon a trial not connected with the assault and homicide set out in the indictment. The bill of exceptions contains no evidence whatever as to these threats, or the character of the parties Lyon or McKee, or the assault upon the trial. It does, however, state that it contains so much of the evidence as is necessary to explain the rulings and decisions of the court in the trial of the case. It is well established that the instructions should be based upon the evidence in the case, and the presumption is in favor of the ruling of the court. There appears in the record no evidence to justify these instructions, and we do not consider it necessary to consider them, for, if correct as abstract principles of law, they do not appear by the record to be founded on any evidence in the case. (*People v. Cochran*, 61 Cal. 548; *People v. Smith*, 59 Cal. 365; *People v. Dick*, 32 Cal. 213.)

The first instruction asked by appellant is as follows: "If the jury believe from the evidence that, on the occasion that James McKee received his mortal wound, the defendant had reason to believe, and did believe, that McKee and Lyon were about to take the life of Caleb Davis, or to do him some great bodily harm, and that there was no other means to prevent it, he would be justified in killing McKee, even if it should be shown that he was mistaken in his belief." The second instruction asked by the defendant and refused is as follows: "If the jury believe, from the evidence, that on the occasion that James McKee received his mortal wound, the defendant

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had reason to believe, and did believe, that McKee and Lyon were about to take the life of Caleb Davis, or to do him some great bodily harm, and that he, the said defendant, was present and had the means and ability to prevent the same, he would have been criminally liable if he had not used every necessary means in his power to protect the life and person of the said Caleb Davis." These two instructions may properly be considered together. There is no pretense that the defendant was a peace officer in the discharge of his official duty at the time of the homicide. While it is stated in some authorities that a private citizen may, under some circumstances, interfere to prevent a felony, and if, in so doing, he kill the wrongdoer, the law will justify the homicide (1 Archibald's Criminal Pleading and Practice, 805; Wharton on Homicide, sec. 533; 2 Wharton's Criminal Law, 1039; 1 Russell on Crimes, \*670; 1 East P. C. 58; 1 Hale's Pleas of the Crown, 484), yet it is argued that the one whom he seeks to protect must be an innocent party. A private citizen cannot thus interfere between two persons, both of whom are in the wrong, and slay one to save the other. The instructions should have been so drawn as to submit to the jury not merely the question of the necessity of killing McKee, but also as to whether Davis himself was an innocent party in the affray, and whether he had done all he could to avoid the encounter. As submitted to the court, the instructions were likely to limit the inquiry of the jury simply to the necessity of killing McKee to save Davis, while, had the other questions been submitted to the jury, they might have found that Davis was the wrongdoer, and that McKee should have been protected instead of Davis. We think these instructions rightly refused.

Appellant excepts to the first, fourth, and seventh instructions requested by the prosecution. The first is a quotation from our statute defining murder and manslaughter, with instruction to the jury to find the defendant guilty of one of those two offenses, or not guilty. We think it justified by the evidence. The fourth instruction is as follows: "The jury are instructed that, while the law requires, in order to constitute murder, that the killing shall be willful, deliberate, and premeditated, still it does not require that the willful intent,

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deliberation, or premeditation shall exist for any length of time before the crime is committed. It is sufficient if there was a design or determination to kill distinctly formed in the mind at any moment before or at the time the pistol was fired; and in this case, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant feloniously shot and killed the deceased, as charged in the indictment, and that before, or at the time, the pistol shot was fired, the defendant had formed in his mind a willful, deliberate, and premeditated design or purpose to take the life of deceased, and that the shot was fired in pursuance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder in the second degree." The seventh instruction is as follows: "The jury are further instructed that if, without such provocation as is apparently sufficient to excite irresistible passion, a person shoots another, and by such shooting occasions death, although he had no previous malice or ill-will toward the person shot, yet he is presumed to have had such malice at the time of shooting, and the person shooting will be guilty of murder." The seventh instruction quoted is supported by Instructions to Juries, by Sackett, second edition, page 694, section 37, and by *Johnson v. Commonwealth*, 24 Pa. St. 387. It has been criticised as not containing the proper definition of deliberation and premeditation. In this case, however, the court instructed the jury to find only for murder in the second degree. The instruction undoubtedly at least defines malice aforethought, and would sustain a verdict of murder in the second degree. We are therefore of the opinion that, as applied to the case at bar, the defendant has no cause of complaint. (*Gardenheir v. State*, 6 Tex. 348; *People v. Nichol*, 34 Cal. 211; *People v. Ah Kong*, 49 Cal. 6; *People v. Siloera*, 59 Cal. 592; *People v. Messersmith*, 61 Cal. 246.) The seventh instruction is sustained by Instructions to Juries, by Sackett, (second edition, page 694, section 37). It is criticised by appellant, on the ground that it does not except justifiable or excusable homicide. This instruction must be taken in connection with the others given, and although it might not contain the precise accuracy which the most critical pleader might desire, yet,

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Points decided.

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if taken as a whole, the charge is substantially correct, and could not mislead the jury. The judgment will not be disturbed. (*People v. Cleveland*, 49 Cal. 577; *People v. Clementshaw*, 59 Cal. 385; *People v. Salorse*, 62 Cal. 139; *People v. Ye Park*, 62 Cal. 204.)

The instructions carefully explain to the jury the statute affecting the rights of defendant, and the court sees no reasonable ground of complaint. Judgment affirmed.

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(February 27, 1888.)

TERRITORY v. GUTHRIE.

[17 Pac. 39.]

**INDICTMENT—ACCESSARY.**—By our statutes all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, are treated as principals, and should be prosecuted and punished as such, yet if one who is in fact an accessory before the fact is indicted as such, this is not a defense of which the accused will be heard to complain.

**INDICTMENT—DIFFERENT COURTS.**—Under our practice, the indictment must charge but one offense, but the same offense may be set forth in different forms and under different counts. *Held*, that the indictment charging one defendant as principal and the other as an accessory before the fact charges but one offense.

**CONTINUANCE—AFFIDAVIT—ADMISSION.**—Where, in a criminal action, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witnesses, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive of its contents, and it is not error for the court after such admission to deny the continuance.

**JUDGMENT—VOID SENTENCE—CORRECTION.**—Where the indictment is good and no error appearing on the trial, but the sentence is void for uncertainty, the appellate court may remand the case to the court below, with directions to enter a proper judgment upon the verdict.

(Syllabus by the court.)

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Argument for Respondent.

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## APPEAL from District Court, Nez Perces County.

Frank Ganahl, James H. Hawley and Albert Hagan, for Appellant.

It is competent to show bias and prejudice on the part of a witness, that the jury may scrutinize and perhaps discredit his testimony. (Roscoe's Criminal Evidence, 181, 182; 1 Greenleaf on Evidence, 450; *State v. Dee*, 14 Minn. 35 (Gill. 27); *State v. Tosney*, 26 Minn. 262, 3 N. W. 345.) Where an accusation against a person includes an offense of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the inferior one; and hence it is within the province of the jury to convict of an assault only, although the indictment charges an assault with intent to murder, or an assault with a deadly weapon. (1 Chitty on Criminal Law, 638; Rev. Stats., sec. 7859; *Stewart v. State*, 5 Ohio, 241; *Givens v. State*, 6 Tex. 343; *Gardenheir v. State*, 6 Tex. 348; 2 Archibald's Criminal Pleading and Practice, 74, 75; 2 Wharton's Criminal Law, 1280; 1 Wharton's Criminal Law, 385 et seq., 565.) The judgment is a fine or imprisonment, not a fine and imprisonment; and for that reason is void as to the imprisonment. (*Ex parte Baldwin*, 60 Cal. 432; *Ex parte Ah Cha*, 40 Cal. 427.) The judgment in case a default is made in the payment of a fine imposed must direct imprisonment for payment of fine until paid, at a certain rate per day. (*Ex parte Ellis*, 54 Cal. 204; *Ex parte Chin Yan*, 60 Cal. 78.) A party illegally arrested has the right to resist, and, if death ensues, he is at most guilty of manslaughter. (*Noles v. State*, Horr. & Thomp. 697 et seq.)

Richard Z. Johnson, Attorney General, for the Territory.

Granting and refusing continuances rests very much in the discretion of the court below, and it is only in cases where that discretion has been abused that this court will review the action of the lower court. (*People v. Gaunt*, 33 Cal. 157, 158; *People v. Walter*, 1 Idaho, 386.) Though the jury may convict of the lesser offense, the court is not bound to instruct them as to the lesser offense, or that they may convict of the

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Opinion of the Court—Broderick, J.

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lesser offense, when there is no evidence to support such a verdict. (*People v. Byrnes*, 30 Cal. 206; *People v. Ah Kong*, 49 Cal. 6; *People v. Estrado*, 49 Cal. 171; *People v. Welch*, 49 Cal. 174.) No instruction should be given which is not logically deducible from the evidence. (*People v. Sanchez*, 24 Cal. 28; *People v. Best*, 39 Cal. 690; *People v. Atherton*, 51 Cal. 498.) The presumption that the officer did his duty in making the arrest is no more in conflict with the presumption of innocence to which a defendant is entitled on his trial than is the presumption of the regularity of judicial proceedings, or of malice, or from guilty possession, or from motive, or from flight, or any one of the thousand other presumptions that may confront the accused. (Wharton's Criminal Evidence, secs. 833, 835, 836; *People v. Smith*, 59 Cal. 365; *State v. Howard*, 10 Iowa, 101; *Commonwealth v. Fowler*, 10 Mass. 293; 3 Russell on Crimes, 220, and note; 1 Bishop's Criminal Procedure, 3d ed., sec. 1131; Lawson's Presumptive Evidence, 53.) The extent of the imprisonment is fixed and declared by the statute, and, when the defendant has been imprisoned the required length of time, he is entitled to be discharged. (*Jackson v. Boyd*, 53 Iowa, 536, 5 N. W. 734; 4 Criminal Law Magazine, p. 841, sec. 34.)

BRODERICK, J.—At the October, 1887, term of the district court for Shoshone county, Mathew Guthrie and Terrence B. Guthrie were jointly indicted for an assault upon Thomas F. Handly, with intent to commit murder. Separate motions were interposed to set aside the indictment, on account of some alleged irregularity in summoning and impaneling the grand jury. These motions were overruled, and the defendants pleaded not guilty. Separate trials were ordered. The defendants then applied for a change of venue, which motion was granted, and the cases were transferred to Nez Perces county for trial. At the December, 1887, term of Nez Perces county, a trial was had, and Terrence B. Guthrie was found guilty "of an assault with a deadly weapon likely to produce great bodily injury." Motions were made for a new trial, and for an arrest of judgment, and were by the court overruled, and the following judgment was rendered: "It is therefore con-



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sidered, and the judgment of the court is declared to be, that you, Terrence B. Guthrie, pay a fine of \$1,000, and that you be taken into custody by the sheriff of Nez Perces county, and taken from this court to the county jail of Nez Perces county, Idaho territory, and thence, unless said fine be sooner paid, within thirty days, to the territorial prison, in Ada county, territory of Idaho; and that you be confined in said prison, at hard labor, until said fine be paid, not exceeding two years from the date of this sentence, and upon the payment of said fine you be released from said custody and confinement." From this judgment, and the order denying a new trial, the defendant Terrence B. Guthrie appealed to this court. The record is voluminous, and counsel for appellant have specified thirty alleged errors in the transcript. From an examination of the record, we are satisfied many of these assignments are not of sufficient interest to justify any further consideration of them.

It is claimed, first, that the indictment is not sufficient to sustain a conviction against the appellant, that the facts stated therein do not constitute a public offense, and that the motion in arrest of judgment should have been sustained. The defendants were indicted jointly; Mathew being charged with an assault with a pistol, etc., with intent to murder, and Terrence B., the appellant, being charged as accessory. Section 7697 of the Revised Statutes abolishes all distinction between an accessory before the fact and a principal, and provides that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." The contention is that, by reason of this statute, one cannot be indicted as an accessory. We cannot agree with this view. The last clause of the statute quoted says: "No other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." It is true the statute makes an accessory before the fact a principal, and it is wholly unnecessary to charge the accused in any other form than as principal; but, if the grand jury does

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charge one who is in fact an accessory before the fact as such, the effect is simply to inform him more clearly of what he must defend against, and therefore it is not a defect of which he can be heard to complain. The supreme court must give judgment without regard to technical errors or defects which do not affect substantial rights. (Rev. Stats., sec. 8070.) We do not mean to assert that this is the better course, but only that the defendant was not prejudiced by this form of charging the offense. Indeed, we think, when the statute clearly provides what shall be a sufficient pleading, that it is always better that the statute should be closely followed.

It was said, on the argument, that the indictment charges two offenses. We do not think it is open to this objection. It is true the statute provides that the indictment must charge but one offense, but the same offense may be set forth in different forms, and under different counts. (Rev. Stats., sec. 7681.) The rule established by this statute is not violated by setting forth the same offense in different forms; and this is all that is herein done.

The case was set for trial on the 15th of December, and when called, the defendants, by their counsel, moved for a postponement of the trial, on the ground of absent witnesses, and supported the motion by their joint affidavit. The motion was overruled, and an exception taken. The record shows, however, that an attachment for the absent witnesses was at once issued, and that the appellant was not put upon his trial until December 21st. The motion for postponement was then renewed, upon the affidavit theretofore presented, but no further showing was made or offered. The prosecution admitted that one of the absent witnesses would, if present, testify to the matters and facts as stated in the affidavit, and thereupon the court overruled the motion. It is conceded that the testimony of this witness was material to the defense. An application for a continuance is addressed to the sound judicial discretion of the court, and appellate courts have uniformly refused to disturb a ruling on such questions, unless it appears that there was an abuse of discretion. In this case, after looking into the whole record, we are satisfied there was not a sufficient showing of diligence on the part of the defendant, and hence

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there was no abuse of discretion in overruling his motion. (*People v. Walter*, 1 Idaho, 386.) But it is urged, on behalf of appellant, that, pending an application for a continuance, the admission by the prosecution in a criminal case that an absent witness would testify to certain facts if he were present, is an admission that the facts set forth in the affidavit used in support of the motion are true; and we are referred to *People v. Diaz*, 6 Cal. 249, as supporting this rule. Our statute makes the rule of evidence in civil actions applicable to criminal actions, except as otherwise provided in the code. (Rev. Stats., sec. 7864.) Section 4372 of the Revised Statutes establishes the rule for a continuance upon the ground of the absence of evidence, and, among other things, says: "The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given, on the trial, or offered and overruled as improper, the trial must not be postponed." We think it would be a strained construction of this statute to hold that when, under it, a party makes the admission, to avoid the expense and delay incident to a continuance, he thereby admits the absolute truth of the evidence set out in the affidavit. Such a construction was certainly not in the contemplation of the legislature, nor do we think it supported by any well-considered authority. We think the correct rule is that, when the admission is made, the affidavit becomes evidence, but not conclusive of its contents. (Wharton's Criminal Pleading and Practice, sec. 645; *State v. Mooney*, 10 Iowa, 506; *King v. Commonwealth*, 8 Ky. Law Rep. 778, 3 S. W. 430; *State v. Jewell*, 90 Mo. 467, 3 S. W. 77, 79; *Boggs v. Merced Co.*, 14 Cal. 358.)

It is contended that the court erred in giving to the jury, of its own motion, certain instructions, and also in refusing certain others asked by the defendant. The record shows a number of instructions refused, but the charge given was full and comprehensive, and was warranted by the evidence in the case. We have failed to find anything in the charge that was prejudicial to the substantial rights of the defendant, or that will warrant a reversal of the judgment. Objection is here taken

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to some remarks of the judge addressed to counsel while refusing instructions presented on behalf of the defendant; but the record does not show that the words were spoken in the presence or hearing of the jury, nor were the remarks excepted to at the time they were made.

It is further contended that the judgment as pronounced is void. The conviction was had under the following statute: "Sec. 6732. Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the territorial prison not exceeding two years, or by fine not exceeding \$5,000, or by both." Several objections are urged against the judgment, but the one most strongly insisted upon is that, when the court imposes the fine, the offense must thereafter be deemed a misdemeanor, and that the defendant could not be imprisoned in the territorial prison by reason of the nonpayment of the fine. The following statute is cited: "Sec. 6311. A felony is a crime which is punishable with death, or by imprisonment in the territorial prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the territorial prison is also punishable by fine or imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor, for all purposes, after a judgment imposing a punishment other than imprisonment in the territorial prison." It seems to us that the real objection to this judgment is its uncertainty. The language is: "That you, Terrence B. Guthrie, pay a fine of \$1,000, and that you be taken into custody by the sheriff of Nez Perces county, and taken from this courtroom to the county jail of Nez Perces county, Idaho territory, and thence, unless said fine be sooner paid, within thirty days, to the territorial prison in Ada county, territory of Idaho; and that you be confined in said prison, at hard labor, until said fine be paid, not exceeding two years from the date of this sentence, and that, upon the payment of said fine, you be released from said custody and confinement." Section 7994 provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two

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Argument for Appellant.

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dollars of the fine." (See, also, Rev. Stats., sec. 7238.) We are not satisfied that in a case where the defendant is tried and found guilty of a felony, and wherein he may be fined or imprisoned, in the discretion of the court, he may not be imprisoned in the territorial prison in default of payment of the fine. We find nothing in the statute that forbids it in such case. (*People v. War*, 20 Cal. 117.)

We find no error in the record except that the judgment pronounced is not sufficiently definite, and for this reason the judgment is vacated, and the case is hereby remanded to the court below, not for a new trial, but with direction to pronounce such judgment upon the verdict as may seem proper. (*Reynolds v. United States*, 98 U. S. 168; *People v. Cozad*, 1 Idaho, 167; *People v. O'Callaghan*, ante, p. 156, 9 Pac. 414.) It is so ordered.

Hays, C. J., and Buck, J., concurring.

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(March 6, 1888.)

WASHINGTON AND IDAHO RAILWAY COMPANY v.  
COEUR D'ALENE RAILWAY AND NAVIGATION  
COMPANY ET AL.

[17 Pac. 142.]

**INJUNCTION—DISCRETION OF COURT.**—The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same where there is no abuse of discretion.

(Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.

W. B. Heyburn and J. T. Morgan, for Appellant.

The lands or right of way of one railroad company cannot be taken as a right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy. (*Cake v. Railroad Co.*, 87 Pa. St. 307; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *In re City*

## Argument for Respondents.

of *Buffalo*, 68 N. Y. 167; *In re New York Cent. R. R. Co.*, 77 N. Y. 248; *In re New York etc. R. Co.*, 20 Hun, 201; *Housatonic R. Co. v. Lee etc. R. Co.*, 118 Mass. 391; *Worcester etc. R. Co. v. Railroad Commrs*, 118 Mass. 561; *Boston etc. R. Co. v. Lowell Lawrence Co.*, 124 Mass. 368.) Laying tracks within the company's location is a "taking" within the statutes. (*Worcester etc. R. Co. v. Railroad Commrs.*, 118 Mass. 561.) Courts of equity will interfere to prevent interference with corporate franchise or private property, where such interference is in the nature of a nuisance, or amounts to an exclusion, and when the intruder has no title or color of title. (*Commonwealth v. Pittsburgh etc. R. Co.*, 24 Pa. St. 159, 62 Am. Dec. 372; *Bigelow v. Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *O'Brien v. Railroad Co.*, 17 Conn. 72; *Cory v. Railroad Co.*, 3 Hare, 593; *Mohawk Bridge Co. v. Utica etc. R. Co.*, 6 Paige, 554; *Bell v. Railroad Co.*, 25 Pa. St. 161, 64 Am. Dec. 687.) Where a party claims a franchise under a statute, and is in the possession and enjoyment of such franchise, equity will interpose to protect and secure the enjoyment of such franchise, because it affords the only plain and adequate remedy. (*Newburgh Turnpike Road v. Miller*, 5 Johns. Ch. 101, 9 Am. Dec. 274; *Boston Water Power Co. v. Boston etc. R. Corp.*, 16 Pick. 525.)

Richard Z. Johnson, for Respondents.

The granting or refusing the preliminary injunction rests in the sound discretion of the court. (*Hicks v. Michael*, 15 Cal. 108, 117; *Slade v. Sullivan*, 17 Cal. 102, 106; *Goldstein v. Kelly*, 51 Cal. 301.) And this discretion should always be exercised in favor of the party most liable to be injured. (*Hicks v. Compton*, 18 Cal. 210; 1 High on Injunctions, secs. 598, 601; 3 Wait's Actions and Defenses, 683, 688; 4 Field's Lawyers' Briefs, secs. 253, 254.) When an injunction restraining the use of a railway would not only be productive of great injury to the railway company and to the public, but would result in no corresponding advantage to anyone, not even to the person asking such relief, it will not be granted. (1 High on Injunctions, sec. 598; 3 Wait's Actions and Defenses, 723.) The supreme court will not interfere with the action of the court below, unless

## Opinion of the Court—Hays, C. J.

there has been an abuse of discretion. (*Parrott v. Floyd*, 54 Cal. 534; *Efford v. Railroad Co.*, 52 Cal. 277-279; *Coolot v. Railroad Co.*, 52 Cal. 65; *Patterson v. Supervisors*, 50 Cal. 344; *Payne v. McKinley*, 54 Cal. 532; *White v. Nunan*, 60 Cal. 406.) Equity will not restrain trespass, unless injury is irreparable, and cannot be compensated in damages. (*Waldron v. Marsh*, 5 Cal. 119; *Schurmeier v. Railroad Co.*, 8 Minn. 113 (Gill. 88), 83 Am. Dec. 770; *Burnett v. Whitesides*, 13 Cal. 156; *Tomlinson v. Rubio*, 16 Cal. 202, 206; *Tevis v. Ellis*, 25 Cal. 519; *Leach v. Day*, 27 Cal. 643, 646; *Mechanics' Foundry v. Ryall*, 62 Cal. 418; *Roebbing v. Bank*, 30 Fed. 744, 745.) Nor where there is an adequate remedy at law. (*Schurmeier v. Railroad Co.*, 8 Minn. 113 (Gill. 88), 83 Am. Dec. 770; *Richards v. Kirkpatrick*, 53 Cal. 443; *Canal Co. v. Kidd*, 37 Cal. 307; *Rahm v. Minis*, 40 Cal. 422; *San Francisco v. Beide-man*, 17 Cal. 464.)

HAYS, C. J.—This action was brought to obtain a temporary and also a perpetual injunction. At the hearing of the application for a preliminary injunction the court refused to grant the writ upon the showing then made, or at that time, but postponed the hearing of such application to a future time. From such order an appeal has been taken to this court.

The granting or refusing of a temporary injunction rests in the sound discretion of the court. (*Hicks v. Michael*, 15 Cal. 108; *Slade v. Sullivan*, 17 Cal. 103; *Goldstein v. Kelly*, 51 Cal. 301.) This court will not disturb the action of a trial court unless there has been a clear abuse of such discretion. (2 High on Injunctions, sec. 1696; *Payne v. McKinley*, 54 Cal. 532; *Parrott v. Floyd*, 54 Cal. 534; *Patterson v. Board*, 50 Cal. 344; *White v. Nunan*, 60 Cal. 406.) After a careful examination of this case, we think the rights of the appellant may be fully protected upon the final hearing; or, if deemed necessary, upon a future hearing of the application for a temporary injunction, as provided for in the order herein appealed from. We are therefore not prepared to say that there has been such an abuse of discretion as would warrant us in interfering.

The order of the court below is affirmed, and the case remanded for further proceedings according to law.

Buck and Broderick, JJ., concur.

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where, and was not a bigamist or polygamist, and did not cohabit with more than one woman. That as an elector of said county and precinct, this plaintiff, while the polls were then and there open for the reception of votes as aforesaid, duly offered to the defendants, judges of said election as aforesaid, his vote or ballot for the election of said county surveyor for said county, and then and there requested defendants to receive and deposit the same. That this plaintiff being thereupon challenged by an elector entitled to vote at said poll, and one of the defendants having declared to this plaintiff the general qualifications of an elector, this plaintiff then and there declared himself duly qualified; whereupon, said challenge not being withdrawn, this plaintiff offered to take, and requested said defendants to administer to plaintiff, the following oath: 'I do solemnly swear that I am a male citizen of the United States, over the age of twenty-one years; that I have actually resided in this territory for four months last past, and in this county thirty days; that I am not a bigamist or polygamist; that I do not cohabit with more than one woman, and that I have not previously voted at this election. So help me God.' But said defendants then and there refused to administer, or permit this plaintiff to take said oath. That said defendants, and each of them, not regarding their duty as judges of said election, and intending to wrongfully deprive this plaintiff of the elective franchise at said election, wrongfully, willfully, and maliciously refused to receive or deposit said ballot, although they, and each of them, then and there well knew that plaintiff was a qualified voter, and entitled to vote at said election; whereby plaintiff was deprived of his vote at said election, to his damage in the sum of ten thousand dollars. Wherefore plaintiff demands judgment against the defendants for the sum of \$10,000 and his costs and disbursements in this action." The defendants demurred on the ground that it appeared on the face thereof that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, plaintiff declined to amend, and elected to stand upon the pleading. The court thereupon ordered the complaint dismissed, and judgment was rendered in favor of defendants for their costs. The plaintiff duly excepted and appealed from the judgment.



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In 1885 the legislative assembly of the territory enacted what is commonly known as the "Test Oath Statute." Section 16 of the Thirteenth Session Laws, 106, reads as follows: "If any person offering to vote shall be challenged by any judge or clerk of the election, or any other person entitled to vote at the same poll, and either judge shall challenge any person offering to vote whom he shall know or suspect not to be qualified, one of the judges shall declare to the person so challenged the qualifications of an elector. If such person shall then declare himself duly qualified, and the challenge be not withdrawn, one of the judges shall then tender him the following oath: 'You do solemnly swear (or affirm) that you are a male citizen of the United States, over the age of twenty-one years; that you have actually resided in this territory for four months last past, and in this county thirty days; that you are not a bigamist or polygamist; that you are not a member of any order, organization, or association which teaches, advises, counsels or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrine rite of such organization; that you do not either publicly or privately, or in any manner whatever, teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law either as a religious duty or otherwise; that you regard the constitution of the United States, and the laws thereof, and of this territory as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding; and that you have not previously voted at this election, so help you God.'" It is contended on behalf of the appellant that this act is void—1. Because it is in violation of the first amendment to the constitution of the United States; and 2. Because it is in conflict with the act of Congress of March 22, 1882. Congress has the superior power to legislate for the territories upon this subject, as well as all others; but its policy has usually been to prescribe the qualification of electors at the first election after the organization of a territory, and thereafter allow the

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Opinion of the Court—Broderick, J.

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legislative assembly of the territory, under certain restrictions and limitations, to regulate and fix the qualifications for the exercise of the elective franchise at all subsequent elections. Section 1860 of the Revised Statutes of the United States was in force at the time the territorial statute was enacted, and is as follows: "At all subsequent elections, however, in any territory hereafter organized by Congress, as well as at all elections in territories already organized, the qualifications of voters, and of holding office, shall be such as may be prescribed by the legislative assembly of each territory; subject, nevertheless, to the following restrictions on the power of the legislature, namely: 1. The right of suffrage and holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the constitution and government of the United States; 2. There shall be no denial of the elective franchise, or of holding office, to a citizen on account of race, color, or previous condition of servitude; 3. No officer, soldier, seaman, mariner, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote in any territory by reason of being on service therein, unless such territory is and has been for the period of six months his permanent domicile." It cannot be doubted for a moment that this act clearly delegates to the territories legislative power over the subject of suffrage, subject to the restrictions enumerated therein. But of course, like all other grants in the organic act, this was subject to the constitutional limitations upon the granting power, and it is equally true, as contended, that by the grant Congress did not and could not divest itself of the power subject to the same restrictions. The act quoted, except the last two subdivisions thereof, has been in force ever since the organization of the first of the now existing territories, and during all this time the power to fix the qualifications for voting and holding office has been a concurrent power of Congress and the territorial legislature; the power of the former being limited by the federal constitution, and the power of the latter being limited by the constitution and by the acts of Congress. March 22, 1882, Congress,

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in the exercise of its power, passed an act, the eighth section of which is alike applicable to all the territories, and declares as follows: "Sec. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any person described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to, or be entitled to hold any office or place of public trust, honor or emolument in, under or for any such territory or place, or under the United States." Counsel contends that by this act Congress undertook to legislate upon the whole subject of disfranchisements growing out of polygamy, bigamy and unlawful cohabitation, and thereby, by implication, withdrew or revoked the former grant of legislative power to the territories. We are unable to find anything in the act itself to warrant this conclusion. The act creates additional disqualifications, and it is to that extent, we think, to be regarded as an amendment to the organic law. Repeal by implication is not favored, and we cannot believe it was the intention of Congress to take away the power over this subject delegated by section 1600 of the Revised Statutes, but think the intention was only to engraft or place another limitation upon that power. This view seems more in consonance with the policy heretofore pursued by the general government toward the territories. It is true that the Congress has the paramount right, and may directly legislate for the government of any territory, and may directly repeal or abrogate any act of the territorial legislature. But it is also true that when Congress confers power upon the legislative assembly of a territory, and, in pursuance of this power, laws are enacted for the government of the people thereof, such enactments must be respected and upheld, unless clearly in conflict with some higher law.

The act of March 22, 1882, disfranchises bigamists polygamists, and those who are guilty of unlawful cohabitation, and disqualifies them from holding office. Section 2 of our statute contains substantially the same provision, as to this class of persons, and then further disqualifies all who counsel, advise, aid and abet in the commission of these offenses. Section 16 of

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the statute (hereinbefore quoted) establishes the mode by which the disqualifications fixed by the former section and by the act of Congress may be ascertained and determined. We see no reason why the legislature, under the delegation of power, could not do this, and therefore conclude the power was concurrent, and, so far as this question is concerned, that these acts may stand together. This brings us to the consideration of a more important question, and one which we approach with a full appreciation of the responsibility. Is this territorial enactment in violation of the provisions of the federal constitution which guarantees religious freedom? It is at once conceded that if the statute prohibits or interferes in any substantial manner with the free exercise of religion then it is void and of no effect. The first amendment to the constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and in another place that "no religious test shall ever be required as a qualification to any office or public trust under the United States." These provisions are limitations upon the power of Congress, but it is readily conceded that Congress could not confer any authority upon a subordinate legislative body that it did not itself have and could not exercise. Therefore the inquiry will be confined to the one question. There is much general discussion of these constitutional inhibitions found in the books, but we have not been referred to any authority, nor do we know of any, upon the precise point involved in the case at bar. The authors, however, agree as to the object and purpose of the amendment, as well as to the causes which led to its adoption. "This amendment," says Judge Story, "cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon, almost from the days of the apostles to the present age. The history of the parent country had afforded the most solemn warnings and melancholy instructions on this head; and even New England, the land of persecuted Puritans, as well as other colonies where the Church of England had maintained its superiority, would furnish out a chapter as full of the darkest bigotry and intolerance as any which could be found

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to disgrace the pages of foreign annals." Judge Cooley, in his valuable work on Constitutional Limitations, 576, says: "Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the state assuming supervision and control of religious affairs, under other circumstances, the general voice has been that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions human tribunals, so long as the public order is not disturbed, are not to take cognizance except as the individual, by his voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters." Authorities might be multiplied, but the result of all is that the government must not interfere with opinion, but may with conduct. Laws are made for the government of actions, and when the conduct and actions are criminal it is no excuse to say that these things, though forbidden by the law, are done in the name of religion. In *Reynolds v. United States*, 98 U. S. 166, Mr. Chief Justice Waite said: "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Governments could exist only in name under such circumstances."

Perhaps the constitutional provision of the state of New York on this subject is as sound a commentary as can be given of religious freedom. "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state."

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But counsel for appellant strenuously argued that the oath here prescribed and required to be taken does in effect interfere with the rights of conscience in religious matters, and thereby with free exercise of religion. The most objectionable clause, and the one said to come within the inhibition, is as follows: "That you are not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization." This clause is undoubtedly open to criticism, but the intention of the legislature was to withdraw the right of suffrage from persons who encourage, aid and abet those who are endeavoring, not by constitutional methods, but against all law, to overthrow a sound public policy of the government, and one that has existed from its foundation. In *Murphy v. Ramsey*, 114 U. S. 43, 5 Sup. Ct. Rep. 747, Mr. Justice Mathews, in construing the act of March 22, 1882, and speaking for the entire court, says: "Disfranchisement is not prescribed as a penalty for being guilty of the crime and offense of bigamy or polygamy; for, as has been said, that offense consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years by section 1044 of Revised Statutes. Continuing to live in that state afterward is not an offense, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state, without cohabitation with more than one woman, he is in that sense a bigamist or polygamist, and yet guilty of no criminal offense. So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecuting for crime."

This case shows clearly that the test is not whether the persons excluded could be prosecuted for any crime, but whether the facts bring the parties within the scope of the act. The decision rests, however, upon the ground that Congress may

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take from the people of a territory any right of suffrage it may have previously conferred, or at any time modify or abridge it, as it may deem best. It should be observed, however, that the right of suffrage is not a natural right, nor an unqualified personal right. The elementary writers do not include this right among the rights of property or persons. (2 Kent's Commentaries, 587.) But, as applied to a territory, it is a right conferred by law, and may be modified or withdrawn by the authority which conferred it, without inflicting any punishment on those who are disqualified. Since the decision of the case of *Murphy v. Ramsey*, *supra*, the power of Congress over this subject has not been disputed, and, if we are correct in the conclusion that the power of the territorial legislature is concurrent, we see no reason why it may not impose additional disqualifications in so far as it acts within the scope of the authority committed to it. It has been well said that "every government ought to contain, in itself, the means of its own preservation." This, in our judgment, enunciates the principle which lies at the foundation of this whole question, and that must finally determine and set it at rest. But the only question for us to determine is purely a question of power. The courts are not warranted, nor are they authorized, to abrogate laws merely because they may be deemed unwise or impolitic. These are questions entirely within the cognizance of the law-making branch of the government, and with which the courts have nothing to do. A statute will not be held void unless its invalidity is clear. If unwise laws are enacted the remedy is with the people, who must correct such legislation through the exercise of their political power. As applied to this case, if the law is impolitic or unjust, the legislature may repeal it, or the Congress may abrogate it.

It will be conceded that if the statute is valid, as the plaintiff did not offer to negative all the disqualifications imposed, his vote was not wrongfully rejected. Test oaths are not new in this country. They have been prescribed at different times in our history, and were justified by some real or supposed public danger or public necessity. But our attention has not been called to any similar to the one before us. The nearest

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approach to it is the one prescribed by the registration officers of Utah, which will be found in the statement of the case of *Murphy v. Ramsey*, 114 U. S. 19, 5 Sup. Ct. Rep. 750. In that case the same objection was raised to the validity of the rule that is here insisted upon; but in that case the court held that the oath required was a proper mode of ascertaining the disqualifications imposed by the law, and that it did not interfere with the free exercise of religion. So we conclude in this case. If we are wrong in this, we congratulate ourselves that there is a court above us for the final adjudication of such questions, where our judgment may be corrected. To this we defer, confident that none will more cordially concur in the result.

Judgment affirmed.

Hays, C. J., and Buck, J., concur.

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(March 6, 1888.)

HAYWARD v. BOLTON ET AL.

[17 Pac. 457.]

APPEAL from Third Judicial District, County of Bear Lake.

Following case of *Innis v. Bolton*.

R. Z. Johnson, for Appellant.

No brief on file.

Ensign & Stull, for Respondents.

Same brief as in case of *Innis v. Bolton et al*.

BRODERICK, J.—The same questions are involved in this case which were presented in the case of *Innis v. Bolton*, ante, p. 442, 17 Pac. 264, just decided by this court; and for the reasons given therein, and upon the authority of that case, the judgment of the court below in this case is hereby affirmed.

Hays, C. J., and Buck, J., concur.



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Argument for Appellants.

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(March 7, 1888.)

## BOHANON v. HOWE ET AL.

[17 Pac. 583.]

**MINING LAW—CITIZENSHIP—RIGHT OF POSSESSION.**—Under the act of Congress of May 10, 1872, only citizens of the United States and persons who have declared their intention to become such can acquire any right of possession, by location or otherwise, of mineral lands on the public domain.

**SAME—PLEADING.**—In an action for trespass upon mining ground and for damages, where the legal title to the ground is in the United States, and the right of possession is made by the pleadings a material issue, the plaintiff, in order to recover, must plead and prove that he is a citizen of the United States, or that he has declared his intention to become such.

(Syllabus by the court.)

## APPEAL from District Court, Lemhi County.

J. T. Morgan, for Appellants.

In an action between claimants to determine the right of possession to a mining claim, the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that the plaintiff is a citizen, or has declared his intention to become such; and, when the action is tried by the court alone, all these facts must be found. (U. S. Rev. Stats., sec. 2319; Act July 26, 1866, sec. 1; *Rosenthal v. Ives*, ante, p. 265, 12 Pac. 904.) No mining customs or rules and regulations can be made which will dispense with the requirements that the location must be distinctly marked on the ground, so that its boundaries may be readily traced. (U. S. Rev. Stats., sec. 2324; *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 7 Saw. 96, 11 Fed. 666, 4 Morr. Min. Rep. 411; *Barnes v. Sabron*, 10 Nev. 217.) The provisions of section 2324 of the Revised Statutes of the United States, requiring the location to be distinctly marked on the ground, so its boundaries may be readily traced, and a record of the claims to be made in manner set forth, are equally applicable to lode and placer claims. (*Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; U. S. Rev. Stats., sec. 2329, passed

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July 9, 1870.) The claim must in some way be defined as to limits, before possession of or working upon a part gives possession to any more than that part so possessed or worked. (*Attwood v. Fricot*, 17 Cal. 43, 76 Am. Dec. 567; *English v. Johnson*, 17 Cal. 115, 76 Am. Dec. 574; *Rogers v. Cooney*, 7 Nev. 213; *Hess v. Winder*, 30 Cal. 355.) If defendants were in the actual adverse possession, plaintiff cannot recover. (*Raffetto v. Fiori*, 50 Cal. 363; *Uttendorffer v. Saegers*, 50 Cal. 496.)

Charles A. Wood, for Respondent.

When it has been proven that the lands in question have been located in accordance with law and local custom, and in possession of plaintiff and his grantors for more than seventeen years last past, no rights can be acquired thereto by an adverse location. (*Belk v. Meagher*, 104 U. S. 279.) Actual possession of a portion of a mining claim, according to the custom of miners, extends by construction to the limits of the claim held in accordance with such custom. (*Hicks v. Bell*, 3 Cal. 220; *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.) Actual possession of a mining claim is not essential to the validity of the title obtained by a valid location, and, until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof. (*Belk v. Meagher*, 104 U. S. 279; *Gropper v. King*, 4 Mont. 367, 1 Pac. 755; *Pralus v. Mining Co.*, 35 Cal. 30; *Weeks' Mineral Lands*, 109, 150, 157.) When the grantor is in actual possession of a mining claim, he may convey the same by verbal sale, accompanied by a transfer of the possession. (*Jackson v. Water Co.*, 14 Cal. 18; *Tunnel Co. v. Stranahan*, 20 Cal. 198; *Gatewood v. McLaughlin*, 23 Cal. 178; *Kinney v. Mining Co.*, 4 Saw. 386, Fed. Cas. No. 7827.)

BRODERICK, J.—This action was commenced in the district court in and for Lemhi county against the defendants for trespassing upon certain placer mining ground, for damages, and for equitable relief by injunction to restrain future trespasses. The case was tried by the court without a jury.

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Judgment for the plaintiff, and defendants appealed. The plaintiff alleged, among other facts, that he was the owner, entitled to the possession, and had been in the actual possession, by himself and through his grantors, for more than fifteen years last past. The answer for the defendants denies the essential allegations of the complaint, and further alleges that the lands were, on the twenty-third day of March, 1885, vacant and unoccupied public lands of the United States, and subject to location under the laws thereof; and that said defendants then located all of said ground.

Neither plaintiff nor defendants have alleged any facts as to citizenship. This seems to us to have been requisite. By the act of Congress of May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the laws, customs, and rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States. It is conceded that if this were an action in support of an adverse claim, and to determine the right of possession therein, it would have been necessary to have pleaded and proved citizenship, or what is its equivalent, in such action. But it is contended that in an action for trespass upon mining ground and for damages by reason of such trespass it is unnecessary to show any fact in relation to citizenship. We cannot adopt this view. The record here shows that the legal title to the ground is in the United States. The right of possession is by the pleading made a material issue. Unless plaintiff can establish this right he cannot recover; and as a prerequisite he must show himself to be a citizen, or to have declared his intention to become such. (*Rosenthal v. Ives*, ante, p. 265, 12 Pac. 904; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522; *Hess v. Winder*, 30 Cal. 355; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621.)

The objection was first raised in this court that the complaint herein does not state facts sufficient to constitute a cause of action. This objection may be taken at any time before final judgment. We think the point well taken, for the

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Argument for Appellant.

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reason hereinbefore given; but as the objection was not raised in the trial court, where the plaintiff would doubtless have been allowed to amend his pleading, we have concluded to reverse, with leave to either party to amend. The judgment is therefore reversed, and the cause remanded for a new trial, with direction to the court below to allow, on application, either party to amend generally.

Hays, C. J., and Buck, J., concurring.

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(March 11, 1889.)

STEMWINDER MINING COMPANY v. EMMA AND LAST  
CHANCE CONSOLIDATED MINING COMPANY  
ET AL.

[21 Pac. 1040.]

**MINING CLAIMS—DISPUTED AREA—EVIDENCE.**—A certain area of mining ground was in dispute between the Stemwinder mining claim and the Emma claim. Each claimed to have made the first valid location to said area. The evidence was conflicting and presented a question of fact for the jury. Plaintiff excepted to certain evidence offered by defendant, in that it seeks to establish the location of a mining claim by parol. The court excluded the evidence. *Held*, the evidence should have been admitted, as it was not improper, and did not tend to prejudice the rights of plaintiff.

**MEASUREMENTS OF MINING CLAIMS—VOID AS TO EXCESS.**—If it is found, upon a survey of a mining claim, that the measurements of the locator are in excess of the area allowed by law, the claim is only void as to the excess.

APPEAL from District Court, Shoshone County.

Frank Ganahl and Albert Hagan, for Appellant.

A location of a claim upon mineral lands of the United States carries with it a grant from the government to the person making the same, and confers upon such person the right to the exclusive possession and enjoyment of all the surface ground within the lines of such location. (*Belk v. Meagher*, 104 U. S. 284.) No estate or interest in real property

## Argument for Appellant.

or in any manner relating thereto or concerning it can be created, granted, assigned or surrendered unless by an operation of law, or a conveyance or other instrument in writing, subscribed by the party. (*Melton v. Lambard*, 51 Cal. 259; Rev. Stats., secs. 2920, 6007; *Jackson v. Shearman*, 6 Johns. 19; *Jackson v. Vosburgh*, 7 Johns. 186; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93.) It is not necessary to plead the statute of frauds to take advantage of evidence of this class when offered. (*May v. Sloan*, 101 U. S. 231; *Dunphy v. Ryan*, 116 U. S. 491, 6 Sup. Ct. Rep. 486; *Dung v. Parker*, 52 N. Y. 494; *Purcell v. Miner*, 4 Wall. 573.) So the amended location of the Stemwinder having been made before the Emma location had ever been properly staked or amended, the plaintiff has the only valid location on the vein. (*Belk v. Meagher*, 104 U. S. 284; *Mining Co. v. Deferrari*, 62 Cal. 160; *Lakin v. Mining Co.*, 25 Fed. 337; *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643.) A notice of location of itself is only a proof of the performance of one step in the location of a mine, the last step in perfecting the location; and even when the certificate, for any of the reasons set forth in the statute, is deemed void, it is admissible, in connection with an amended location correcting the defects of the original. (*Van Zandt v. Mining Co.*, 2 McCrary, 159, 8 Fed. 725; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652.) A claim located within the boundaries of another existing location is void. (*Mining Co. v. Smith*, 2 Dak. 399, 11 N. W. 98.) The location of a mining claim is absolutely void if the discovery be made on a claim already located; and continues void, and is not cured or made effectual by a subsequent discovery on the claim located. (*Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66.) A location of a mining claim cannot be made by a discovery shaft upon any claim which has been previously located, and which is a valid location. (*Little Pittsburgh Consol. Min. Co. v. Aimie Min. Co.*, 17 Fed. 57.) No rights can be acquired under the statute of location before the discovery of a vein or lode within the limits of the vein located. (*Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666.) No valid location of a mining claim can be made until a vein or deposit of gold, silver, etc., has been discovered. (*Mining Co. v. Cor-*

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*coran*, 15 Nev. 147.) No location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim. Discovery of one, after location, in a different part of the claim, will not avail. (*Van Zandt v. Mining Co.*, 2 McCrary, 159, 8 Fed. 725.) The statute contemplates that the location of a vein shall be along the course of the lode or vein. (*Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 485, 7 Sup. Ct. Rep. 1356.) Side lines are side lines only when they are parallel with the course of the vein. When they cross the vein they become end lines. (*Mining Co. v. Tarbet*, 98 U. S. 463; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356; *Iron Silver Mining Co. v. Elgin Mining etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177.)

Woods & Heyburn, for Respondents.

A locator, having selected his point or location, could not claim the surface of the ground to exceed three hundred feet on either side of it for the width of his claim, nor to exceed fifteen hundred feet along the course of the vein measured from the point of discovery; and if, in marking his claim upon the ground, he inadvertently or from any cause included more ground than three hundred feet on each side of his discovery, his claim would be void as to the excess. (*Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055.) A thing which is void from the beginning cannot be so amended as to give it validity. (*Belk v. Meagher*, 104 U. S. 284; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356.) Locations in excess of the length or width allowed by law are void only as to the excess. (*Mining Co. v. Tarbet*, 98 U. S. 463.) Recording notice of a mining claim is directory, and not imperative. (*Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666.)

WEIR, C. J.—This is an appeal from a judgment in favor of the defendants and against the plaintiff, entered upon the verdict of a jury, and also from an order denying a motion for a new trial. The cause of action arose in the county of Shoshone, in the first district. The complaint substantially alleges that the plaintiff is a corporation duly organized and

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existing under the laws of the state of Oregon, and that one of defendants is likewise a corporation organized and existing under and by virtue of the laws of the same state; that since the eleventh day of March, 1887, plaintiff has been, and is now, the owner of the premises in dispute, subject only to the paramount title of the United States, and is entitled to the possession of a certain mine and mining claim, called "Stemwinder Mining Claim," and then proceeds to set out the description of the claims of the plaintiff and of the defendants, and that the grantors of the defendants, on the sixth day of March, 1887, filed with the register of the land office an application for a patent, and in such application wrongfully, and without right, set up title to certain premises which the plaintiff claims is the property of itself, and that the suit is brought for the purpose of ascertaining the ownership of the said alleged tract of land in dispute; and then prays judgment against the defendants: (1) That the plaintiff is the owner of, and lawfully in and entitled to the possession of, the premises described—the area in conflict between the Stemwinder mining claim and the alleged Emma mining claim—and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof; and that the defendants have no title to or right of possession of said conflicting area, or the lode therein, or any part thereof. The defendants demurred to the complaint in the action, which demurrer was overruled by the court, and the defendants were given five days in which to prepare and serve an answer. The answer, though very long, contains substantially general denial, and sets up title or claim to the premises in dispute by reason of a location thereof by certain parties, and the transfer thereof to the defendants, and that such location was prior to the location made by plaintiff's grantors; and further claims that the location under which the plaintiff claims was never, at any time, located, staked, marked, and defined in accordance with the requirements of law, if at all, until long subsequent to the aforesaid location of the Emma mining claim by the locators thereof; and that the plaintiff is not, nor has it ever been, in possession of the area so in conflict, as aforesaid. Upon these issues the case came to trial.

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The plaintiff offered such evidence as it saw fit as to the location of its claim, and the defendants did the same. Strictly, there was but one issue in the case, and that was, Which of the parties made the first valid location of the area in dispute? The evidence on that point was conflicting, and presented a question of fact for the jury. Upon this question the jury rendered a verdict in favor of the defendants, and against the plaintiff, whereupon the plaintiff made a motion for a new trial upon the proper papers, which motion was denied.

The questions presented for our consideration are alleged errors made by the court in the admission of certain testimony; and as to the charge made by the court to the jury; and its refusal to charge certain requests made by the plaintiff. The only exception taken to the admission of alleged improper evidence by the court was in regard to a compromise monument erected along the alleged line between the claim of the plaintiff and defendants. The defendants offered evidence to show that the compromise point was erected by agreement, not for the purpose of establishing a location, but for the purpose of showing where the location was, as it was then understood by all parties. This evidence the court, upon objection by the plaintiff, excluded, but it appears that a map used for other purposes on the trial contained upon its face the compromise monument, and that it was frequently referred to as the compromise monument, and, as so referred to, the question was really before the jury. It appears that the court permitted evidence by the engineer who surveyed the defendants' claim in December, 1886, in regard to having this compromise monument pointed out to him, by the parties then claiming the ground, as the compromise monument agreed upon by such parties themselves.

We are by no means prepared to say that the evidence, as offered by defendant, was not admissible. Such evidence was not within the rule laid down by the authorities cited by the plaintiff, and did not seek, in any manner, to establish the location of a mining claim by parol; but, on the contrary, really sought to show that the claims, as located, were in some dispute, and the parties ran the lines by agreement so as not to interfere with each other, and placed this monument only for



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the purpose of showing that they had done so. But, even though this was error, the testimony admitted by the court was clearly right and proper. The engineer, in making the survey, referred to this compromise monument only to show how, and in what manner, he had made the survey. We see nothing in the admission of this testimony which was improper, or which in any manner tended to prejudice the rights of the plaintiff.

We shall not notice the many exceptions taken by the plaintiff in regard to the charge of the court, and the refusal of the court to make certain charges at the request of the plaintiff. Most of them are utterly without merit, for the reason that the court had already fully charged upon propositions requested, and also for the reason that many of the requests practically called for a decision upon the same propositions of law rejected by the court, couched in different language. The charge of the court as delivered was very full and complete, and really presented to the jury every question necessary for their consideration; and the many requests made by the plaintiff were but a repetition of the charge already delivered.

We shall notice, however, three of the plaintiff's exceptions: 1. Those which relate to the defendants' location being in excess of the quantity of land allowed by law; 2. The right of a corporation to locate a mining claim; and 3. The question raised by the plaintiff as to what distance the plaintiff was entitled to from the middle of the vein or point of discovery.

It is perfectly clear in our mind that the location of the defendant was not wholly void for the reason that the defendants' grantors did, in marking the boundaries of the location, place their stakes more than fifteen hundred feet in length and six hundred feet in width. Under the evidence in this case no fraud is alleged or claimed. No rights of third parties were infringed upon, and the evidence is conclusive that the location was made by measurements by the eye and by stepping off the distances; and it also appears that in December, 1886, the alleged location was surveyed, and the lines were drawn in such manner that the amount of the claim was not in excess of the amount allowed by law. This occurred prior to the plaintiff's making its amended location; and, under the

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facts of this case, there can be no question that the location or claim of the defendant was void only as to the excess. The authorities would seem to be conclusive upon that point: *Atkins v. Hendree*, 1 Idaho, 95; *Mining Co. v. Tarbet*, 98 U. S. 464; *Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055.

It appears conclusively from the location notice placed upon the ground by the defendants' grantors at the time of location that they only claimed fifteen hundred feet along the lode or vein and three hundred feet on each side, and no more. There is nothing in the contention that the decision of the court in the last case does not apply in principle to the present case. It is true that that case was decided under the act of 1866; and the present case arises under the act of 1872; yet the principle is the same. In that case the court says: "We hardly think it needs discussion to decide that the inclusion of a larger number of linear feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, where there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law? We can see no reason in justice or in the nature of the transaction why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with the rights previously acquired." We do not, therefore, think it necessary to further consider this point, except to say that we find no error in the refusal of the court to charge on the subject as was requested by the plaintiff. Moreover, there was no merit in the plaintiff's requests. The location of the plaintiff, as proven, showed the same state of facts in relation to itself as did the defendants'; and the court would not have been justified, under the evidence, in charging the jury that the defendants' location only would be void.

The defendants requested the court to charge the jury that the plaintiff was a corporation organized under the laws of the state of Oregon, and that no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States. This the court charged. Without deciding whether this was error or not, we can safely say that it is not

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such an error in this case as would justify the court in reversing the judgment. There was no evidence that the corporation made the location. On the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff. Besides this, the defendants' claim was in precisely the same condition, and the evidence was conclusive that the defendants did not make the location, but stood in the same position as the plaintiff did; namely, they had purchased their claim from citizens, who had made locations. The charge of the court being perfectly clear as to the real facts of the case, and the case being properly submitted to the jury, to charge as the court did, under all the circumstances, was not error, as such charge could not, in any manner, have injured anyone. We therefore conclude that as to this point there was no error to justify us in reversing the judgment.

As to the third and last point which the plaintiff raises, we think there is nothing whatever in it, and that the charge, as delivered by the court, was perfectly correct under the facts in every respect. Under the circumstances the court would have been perfectly justified in refusing to consider the requests made by the plaintiff at that time; but, even as delivered and refused, we find no error. The court stated to the jury that "at the time of the location, the measurement must be from the point of discovery—the middle of the point of discovery—unless there is evidence before you that the vein had been actually established and run; but, if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to three hundred feet on each side of the middle of the vein at the point of discovery, as they had so located this claim. It must not exceed three hundred feet—that is, they are entitled to three hundred on each side of the vein." This we think was proper, and was the only charge that could have been given to the jury under the state of the evidence.

The plaintiff seems to lay great stress on the fact that the court refused to charge the twenty-second proposition requested by it. In answer to this claim it is only necessary to say that,

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from the examination of the record, it will be found that the court charged the proposition, except as to two or three lines, which should not have been charged. At the conclusion of the charge the court verbally charged the jury as follows: "That there is really but one question in this case, and that is. Who first made a valid location on this ground? That is really the whole question. Now, to determine that point, you must go into all the evidence you have heard. Reconcile it, if you can, and ascertain, if you can, who, in your judgment, made a valid location upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and, whatever may be the facts in this case, the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location of the ground in dispute, then the defendant is entitled to a verdict at your hands. I state this to you so as to simplify the case and bring it down to the direct point in issue." Under the pleadings and the evidence this charge was perfectly proper, and the jury could not have been mistaken as to what was the real issue in the case. The evidence was conflicting, but fully justified the verdict of the jury.

The contention of the plaintiff that because the location notice, as recorded by the defendants, described the defendants' claim as adjoining the Stemwinder, the defendants are estopped from claiming that their location is prior in point of time to plaintiff's, under the evidence and the explanation which was given of that statement, is utterly without merit. We think that there is no error in the record which would justify this court in reversing the judgment. The judgment is therefore affirmed with costs.

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Statement of Facts.

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(March 11, 1889.)

## BOWMAN ET AL. v. AYERS.

[21 Pac. 405.]

**IRRIGATING DITCH—TENANTS IN COMMON—CONTRACT—RESCISSION—DAMAGES—PART PERFORMANCE.**—Where four persons owned in common a water ditch, and while in joint possession and use of the waters thereof said tenants in common entered into an agreement in writing with A., agreeing that if A. would do certain work in enlarging and improving the ditch, that he should have an interest therein, and right to use water therefrom. A. entered upon the performance of his contract, and did work upon the ditch, to the value of fifty dollars, and began to use water from the ditch, and was proceeding to complete his contract when he was stopped by the owners, including the persons with whom he had contracted, and who declared the contract rescinded, whereby A. was prevented by them from the completion of his work. No reason was assigned for the attempt to rescind, and no offer to pay for the work done. A. insisted upon his contract and right to use the water under it, and continued to use the water from the ditch. Thereupon the owners, including the contracting persons, brought a joint action in trespass against A. for wrongful use of the water from the time he entered. *Held*, (1) that the defendant's acts did not constitute trespass, and that the plaintiffs cannot recover; (2) that a party to a valid contract, in the absence of fraud or other special reason, cannot rescind at pleasure; (3) that where there has been part performance, a party cannot rescind and still retain the benefits received under the agreement.

(Syllabus by the court.)

## APPEAL from District Court, Ada County.

The facts fully appear in the following statement by BERRY, J.:

This is an appeal from a judgment rendered in the district court, Ada county. The action is for damages, in trespass, and also praying equitable relief. The complaint avers, in substance, "that in 1883 the plaintiffs were the owners and in possession of a certain ditch, necessary for irrigating the lands of plaintiffs; and that the defendant wrongfully entered upon and cut and tapped said ditch, also drew water from said ditch,

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Statement of Facts.

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to the plaintiffs' damages \$500." It also avers that in 1883, 1884, and 1885 the defendant wrongfully placed dams in said ditch, and cut down its banks, to the further damage of the plaintiffs \$200. It further avers that the defendant is continuing such trespasses, and threatens and intends to continue them; that the defendant is insolvent, and the plaintiffs remediless, unless the defendant be enjoined; and prays judgment for the sum of \$500 damages sustained; also that an injunction issue against the defendant. The answer puts in issue each allegation of the complaint and avers ownership, in common with the plaintiffs, to the extent of one-sixth of the whole ditch; that he also owns lands (describing them) to which one-sixth of the waters of the ditch are necessary; that prior to 1887, the ditch being in part on and through the defendant's lands, the plaintiffs wrongfully entered upon his said lands, and enlarged the ditch, and did damage, etc.; and demands judgment, etc. The cause was tried before the court with a jury, and a general verdict was rendered in the following words: "We, the jury in the above-entitled action, find for the plaintiffs, and assess the damages at the sum of nothing." The jury also under instructions of the court, made special findings; the seventh, eighth, and ninth being as follows: "Question submitted to jury, by the court: Q. 7. In the matter of the contract made between the defendant and the plaintiffs in the spring of 1883, by which the defendant was to enlarge and improve the ditch for an interest therein, did the defendant perform all the conditions of the agreement on his part? A. He did not. Q. 8. What was the cost to the plaintiffs of the construction of the ditch under controversy? A. \$500. Q. 9. What was the value to plaintiffs of the work done, or caused to be done, by the defendant on the ditch under the contract made in the spring of 1883? A. \$50." The special findings of the jury, except the fifth, are on the alleged trespass of the defendant, and are, in substance, included in the general verdict. The fifth special finding is that the enlargement of the ditch on defendant's land by the plaintiffs was not without defendant's consent. On this verdict judgment was entered for the plaintiffs decreeing the said ditch to be the property of the plaintiffs; that the defendant be barred of all interest therein; and for \$271 costs of this action.

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Argument for Respondents.

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## Brumback &amp; Lamb, for Appellant.

Though an oral purchase from a cotenant does not convey the legal title, it gives the purchaser an equitable title to the interest of the cotenant, and protects him from being a trespasser. (*Hoffman v. Fett*, 39 Cal. 111.) The other cotenants can take no advantage of the statute of fraud so long as the selling cotenant does not. (*Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351.) When the answer contains a cross-complaint, it must be replied to so far as the cross-complaint is concerned, or the matters therein alleged will be taken as confessed. (*Herold v. Smith*, 34 Cal. 124.) The plaintiffs had no right to rescind the contract after part performance by defendant. (2 Parsons on Contracts, 7th ed., pp. 653, 812.) Judgment outside of the issues is against law. (*Lothian v. Wood*, 55 Cal. 164.) A party cannot allege one cause of action and recover on another. (*Black v. Merrill*, 65 Cal. 92, 3 Pac. 113.) The complaint in this case is totally defective for a complaint quieting title, inasmuch as it nowhere alleges that the defendant claimed any right or interest in the ditch, but, upon the other hand, it alleged he had no interest. (Rev. Stats., sec. 4538.)

## Huston &amp; Gray, for Respondents.

It is entirely within the discretion of the court to grant or refuse a jury trial in an equity case. (*Societe Francaise v. Selheimer*, 57 Cal. 623; Code Civ. Proc., sec. 4365; *Kopikus v. State Capitol Commrs.*, 16 Cal. 249; *Brewster v. Bours*, 8 Cal. 501; *Weber v. Marshall*, 19 Cal. 447; *Houser v. Austin*, ante, p. 204, 10 Pac. 37.) In equity cases, where special issues are submitted to a jury, their verdict is merely advisory to the court. (*Warring v. Freear*, 64 Cal. 54, 28 Pac. 115; *Freeman v. Stephenson*, 63 Cal. 499; *Stockmon v. Irrigating Co.*, 64 Cal. 57, 28 Pac. 116; *Bates v. Gage*, 49 Cal. 126.) Mere lapse of time does not constitute an abandonment, but it may be given in evidence, for the purpose of ascertaining the intention of the parties. (*Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Seymour v. Wood*, 53 Cal. 303; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.) Sale for a nominal price may be received in evidence, as tending to show abandonment. (*Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901.) Fail-

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ure to use the water is competent evidence of abandonment. (*Davis v. Gale*, 32 Cal. 34, 91 Am. Dec. 554.) A deed subsequent to abandonment is void. (*Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Preston v. Keys*, 23 Cal. 195.) A cross-complaint must state all the facts which would be required in an original complaint to entitle the party to affirmative relief, and it cannot be helped out by the averment of any other pleading in the action. (*Collins v. Bartlett*, 44 Cal. 381; *Doyle v. Franklin*, 40 Cal. 110; *Blum v. Robertson*, 24 Cal. 141; *Jones v. Jones*, 38 Cal. 585.) Findings of a jury in issues submitted to them in an equity case, if not objected to by motion for a new trial, cannot be questioned in the supreme court. (*Duff v. Fisher*, 15 Cal. 375; *James v. Williams*, 31 Cal. 211; *Reed v. Bernal*, 40 Cal. 628.) A pleading improperly designated as a "cross-complaint" will not be treated as such, so as to necessitate an answer thereto. (*Harrison v. McCormick*, 69 Cal. 617, 11 Pac. 456; *Thompson v. Thompson*, 52 Cal. 154; *Jones v. Jones*, 38 Cal. 585.)

BERRY, J. (After Stating the Facts.)—There are numerous assignments of error in this case, but we shall not find it necessary to consider them all. Evidence was given upon the trial tending to show an agreement in 1883, and before the acts complained of, between the plaintiffs, or some of them, and the defendant, for a purchase by the defendant of the right to take water from this ditch; the plaintiffs claiming to be tenants in common of the right to the water flowing in the ditch. The counsel for the defendant requested the court in its charge to the jury to instruct them that "if you find from the evidence that the plaintiffs, or a portion of them, proposed in writing that the defendant should be entitled to water if he should do certain work on the ditch, and defendant accepted such proposition, and proceeded to do such work, and offered to complete the same, but was prevented by the plaintiffs, the defendant is entitled to the rights the plaintiffs proposed to give him. They cannot rescind the contract if the defendant had accepted, and partly performed, and offered to perform the rest, but was prevented by plaintiffs." The court refused to so instruct, but modified the request, and gave the modified charge as follows:



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"If you find from the evidence that the plaintiffs, or a portion of them, proposed in writing that the defendant should be entitled to water if he should do certain work on the ditch, and defendant accepted such proposition, and proceeded to do such work, and performed all the conditions of the contract on his part, then he was entitled to his proportion of the water." This charge was objectionable for ambiguity, and as it really made the jury the judges of the legal obligations of the defendant. But, given as it was, in contradistinction to a request clearly defining the rights of the defendant, and the obligations of the plaintiffs, it could be understood by the jury only as charging that acts of the plaintiffs could not excuse the defendant from the full completion of all the work to be done. The evidence tended to show his acceptance of the plaintiff's terms, and a part performance. Indeed, the court submits the question to the jury as to the value of the defendant's work on this agreement; and the jury found upon it as follows: "Question for special finding. What was the value to the plaintiffs of the work done, or caused to be done, on the ditch by the defendant under the contract made in the spring of 1883? Answer. \$50." But the respondent seeks to avoid the consequences of this error of the court in refusing to charge as requested, and in giving the modified charge, by claiming that, even if the charge was wrong, and the finding of the jury was wrong in consequence of it, still it does not prejudice the defendant, for the reason that the verdict of the jury was only advisory, and not conclusive upon the court; that the court still had the evidence before it, and could make its own findings on this point; and that the court did in fact act on this view of its duties, and in the fifteenth finding of fact found as follows: "That the defendant did, in the spring of 1883, enter into a contract with the plaintiffs Bowman, Butler, and McDowell, to enlarge the ditch described in the plaintiffs' complaint, and have an interest therein; that the defendant failed to perform the conditions of said agreement, and plaintiffs terminated said agreement." This the court had no right, as an original finding, to do. The question submitted to the jury was one of fact, in a common action at law, for damages arising from trespass. In the seventh amendment to the constitution of the United States it is provided that "in suits

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at common law no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law." We are aware of no rule of law authorizing such re-examination, except through the regular proceeding of appeal. That the court followed the jury makes no difference with its right to make an original finding on this point. Its duty, if it did anything as to stating this as a fact found, was to follow the verdict; and the only allowable presumption is that it did so. And it is equally presumable that the jury found that the acts of the defendant were unlawful, from the erroneous charge given them. The charge as given could have been followed by no other results, providing any part of the work the defendant was to do had not been done; and this although the cause of that failure was the unlawful acts of the plaintiffs themselves. His readiness and willingness to perform, if, indeed, such was the fact (and the evidence on that point raises a strong presumption on his part of such readiness and willingness), was not allowed to go to the jury, or to have any consideration by them. It may be further said that no notice was taken by either the court or the jury of the work done under this contract, further than to assess its value. But that work had been done by the defendant on that contract, and it appears that the plaintiffs, without repaying it or offering to do so, "rescinded the contract." A party to a valid contract, where there is no fraud or other special reason (and none is here shown), cannot rescind at pleasure, and especially where, as in this case, there has been a part performance, and still retain the benefits received under it. (2 Parsons on Contract, 679, 680; 1 Wharton on Contracts, sec. 285, and cases cited in notes.) The judgment should be reversed. Judgment reversed. All concur.

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Points decided.

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(March 11, 1889.)

## MINTY v. UNION PACIFIC RAILWAY COMPANY.

[21 Pac. 660.]

**MASTER AND SERVANT—RISKS.**—The traveling auditor of a railroad company, whose duties are to travel on the company's cars from stations on its roads and audit accounts, is a servant of the company's, and assumes the ordinary risks incident to the employment.

**SAME—ACCIDENT—PRESUMPTION.**—Where such servant is injured in an accident resulting in the derailment of the car on which he is riding, it will be presumed, until the contrary is shown, that the company was not in fault in providing suitable instrumentalities for the business, and had no notice of any defect or other causes of the accident.

**WHAT PARTY INJURED MUST SHOW.**—Before the servant can recover, he must show that the injury did not arise from a defect obvious to himself, or which, by the exercise of ordinary care, he might have known.

**HAZARD OF BUSINESS.**—He must show it was not from hazard incident to the business.

**CHARGES TO THE JURY.**—Where the judge charged the jury that, if the car was overturned by reason of any defect in said car, or of the track on which it was running, this is in itself presumptive evidence of neglect on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever, *held*, that as between master and servants such presumption of negligence does not so arise, and the charge was erroneous.

**SAME.**—The court also charged, while the burden of proof is on the plaintiff to show negligence of the defendant, yet it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of the defendant, and that the cause of that injury was probably the negligence of the defendant, *held*, to be error, and that whether it is so or not is in the knowledge of the defendant, and the defendant must then show what the real cause of the injury was, and if the defendant does not choose to give the explanation, the jury will be authorized to find that the real cause of injury was the negligence of the defendant in the particular case specified in the complaint, *held*, that this was error.

(Syllabus by the court.)

APPEAL from District Court, Oneida County.

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Statement of Facts.

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The facts appear in the following statement by BERRY, J.:

On the twelfth day of January, 1884, the plaintiff was in the employ of the defendant as traveling auditor, his duties extending over the entire lines of the company west of Cheyenne, including the entire Utah and Northern road, and continued in such employment until August 17, 1886. On the seventh day of January, 1886, while on duty, and on a train, traveling from station to station on the Utah and Northern road, and in the course of such employment as traveling auditor, the car in which the plaintiff was riding was derailed and the plaintiff was injured. The case was tried by a jury before Honorable Case Broderick, district judge, at the May term, 1888, in Oneida county. The jury returned a verdict for the plaintiff, and assessed his damages at \$4,000. Judgment was entered and docketed the same day. A bill of exceptions was duly made by the defendant, and a case containing the evidence, bill of exceptions as agreed upon by the respective parties, was settled and allowed, upon which the defendant moved for a new trial, which was refused, and the defendant appeals from both the judgment and the order denying a new trial. In the complaint the cause of action is stated as follows: "That on or about the first day of November, 1885, and from that time continuously until on or about the first day of April, 1886, the defendant negligently and carelessly permitted the said line of railroad, known as the 'Utah and Northern Railway,' to become ruinous and out of repair, and so negligently and carelessly permitted the rails upon said railway to become worn out and weak and insufficient to support the trains run upon the same, and particularly did negligently and carelessly permit said rails to become so worn out and weak and insufficient on the seventh day of January, 1886, at a point in Montana territory, near Monida station, that the said rails there became broken on the passage over them of the train on which the plaintiff was that day riding, as hereinafter stated; that on the said seventh day of January, 1886, this plaintiff was traveling in the discharge of his duties as traveling auditor upon the regular passenger train of the defendant; that the defendant, while knowing the ruinous condition of its said track, was nevertheless running both passenger and freight trains upon it; that while plaintiff was rightfully riding said train, it came to a

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Argument for Appellant.

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point near Monida aforesaid, where said rails were worn out, and weak, and insufficient to support the trains, as above stated, when, by reason of the said worn out, weak, and insufficient condition of said rails, upon said track so negligently and carelessly permitted to be and remain there, one of said rails became broken, and the car in which plaintiff was riding was thereby and by reason of the aforesaid ruinous condition of the track at that place run off the track," etc., whereby the plaintiff was injured, etc., to his damage, etc.; "that plaintiff was at all times before he received said injuries ignorant of the ruinous condition at said place, and defendant had then, and for a long time immediately prior thereto, notice and full knowledge of said ruinous condition of said railroad; wherefore the plaintiff demands judgment." The answer puts in issue each allegation of the complaint, but avers that plaintiff "was at the time an employee of the defendant, to wit, its traveling auditor upon the said Utah and Northern Railway and other lines of railway owned or operated by defendant; that it was the duty of the plaintiff to travel from one station to another on the line of said railway, and audit the accounts of the station agents of defendant on said railway; that by his contract of employment . . . plaintiff was to receive a certain price and compensation per month, and was to be transported from place to place on said railway, free of charge, as his duties as such employee required; that in pursuance of said contract the defendant issued to plaintiff an employee's time-pass or free ticket; that said pass had indorsed thereon a condition to the effect that the person accepting the same should assume all the risks of accidents, etc.; that the plaintiff had knowledge of such indorsement, accepted the terms, and was bound by it." Other facts of the case will appear in the opinion of the court.

P. L. Williams and W. H. Savidge, for Appellant.

The evidence must establish the negligence alleged to be the cause of the injury, or it fails to justify the verdict. (*Baterson v. Railway Co.*, 49 Mich. 184, 13 N. W. 508; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358; *Murray v. Railroad Co.*, 3 N. Mex. 337, 9 Pac. 369.) The burden of proof of the negligence alleged is upon the plaintiff. (Wood on Master

## Opinion of the Court—BERRY, J.

and Servant, sec. 382; Shearman and Redfield on Negligence, secs. 222, 223; *Rose v. Railroad Co.*, 58 N. Y. 221, 222; *Wright v. Railroad Co.*, 25 N. Y. 562; *Railroad Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411.) And proof of the accident merely, or the injury received, is not sufficient to establish negligence even *prima facie*. (Wood on Master and Servant, sec. 419; Whar-ton on Negligence, sec. 421; *Nyctoglycerin Case*, 15 Wall. 524; *Lockwood v. Railway Co.*, 55 Wis. 50, 12 N. W. 401; *Railroad Co. v. Scott*, 64 Tex. 549.) Evidence relating to accidents and repairs or replacements, occurring and made at points remote from, and long after the happening of, the particular accident causing the injury complained of, is not admissible. (*Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. 358; *Reed v. Railroad Co.*, 45 N. Y. 574; *Dougan v. Transportation Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Hudson v. Railroad Co.*, 59 Iowa, 581, 44 Am. Rep. 692, and note, 13 N. W. 735; *Hipsley v. Rail-way Co.*, 27 Am. & Eng. R. R. Cas. 287; *Railroad Co. v. Fox*, 11 Bush, 495; Pierce on Railroads, 293.)

Smith & Smith and R. D. Winters, for Respondent.

Derailment of a car makes out a *prima facie* case of negli-gence. (*Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; *Railroad Co. v. Rainbolt*, 99 Ind. 551; *Hipsley v. Railway Co.*, 27 Am. & Eng. R. R. Cas. 287, and note.) The allegation of the derailment of the cars, and the consequent injury to plaintiff, were all he needed to prove. (*Rail-way Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; Shearman and Redfield on Negligence, secs. 280, 280a; *Edgerton v. Railway Co.*, 39 N. Y. 227; *Fairchild v. Stage Co.*, 13 Cal. 605; Thomp-son on Carriers, 181, 355; *Fitch v. Railway Co.*, 45 Mo. 322.)

BERRY, J. (After Stating the Facts.)—The specific wrong by the defendant of which the plaintiff complains, after a gen-eral statement relating to the track, is that “in particular [the defendant] did negligently and carelessly permit said rails to become so worn out and weak and insufficient, on the seventh day of January, 1886, at a point in Montana territory, near Monida station, that the rails there became broken, on the passage over them of the train in which the plaintiff was that day riding”; that on that day “the defendant, well knowing the

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condition of its said track," ran its cars upon it, and, at a "point near Monida aforesaid," where the rails were worn out, and too weak to support the train, and by reason of such weak and worn-out condition of said rails "there" or at that point the car in which the plaintiff was riding "was thereby and by reason of the said ruinous condition of the track at that place run off the track," and the plaintiff was injured. No defect in the cars or other machinery is alleged, nor is there any misconduct on the part of the persons in charge of the train either alleged or shown; but the sole grievance is that the track at that point was ruinous and weak, and the defendant, knowing it, still ran its trains; that this weakness of the track threw off the car, and caused the injury. There is no direct evidence that a rail was broken. No one seems to have seen a broken rail. Nor is there any evidence of special defect in the track at that point. A careful review of the evidence would indicate that the track, where the accident occurred, was as good, if not better, than at other parts of the road; but the issue is tendered and joined as to a defect in the track, and that such defect was the cause of the accident. To sustain the position of the plaintiff as to the weak and ruinous condition of the track at this time and place, the following questions were asked by the plaintiff of Timothy Farrel, the conductor of the wrecked train, and evidence given under objection, duly made by the defendant, as to each question and answer. "Q. What caused this wreck? A. I don't hardly know what caused the wreck. I suppose it was a broken rail. Q. Was the track laid with new iron or steel shortly after the accident? A. Not for some time. I believe it was some time late in the following fall. Q. What, if any, was the difference in the new rails, that were laid then—what is the difference in the size of the new rails and the old ones? A. There is considerable difference in the size and heft both. Q. Which is the heaviest? A. The last iron laid was considerably heavier than the iron it replaced. Q. Can you give the comparative difference? Is one twice as heavy as the other? A. I don't think it is twice as large. Q. Have you observed any broken rails along there since the new track was laid? A. No, sir; not to my personal knowledge. Q. Was not one of the causes of the track being rough (with-

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out reference to any particular place) because the ends of the rails were battered down? A. I expect it was. Q. Have you had your train wrecked at any other time since this accident—the accident in which the plaintiff was injured? A. Yes, sir. Q. How many times? A. Twice that I remember. Q. On the same road? A. Yes, sir. Q. How near to this place did they happen? A. One was about fifty miles, and the other about eight miles, from it. Q. How long after this wreck? A. One was about six months, and the other about a year; one happened before, and the other after, this wreck. Q. Was the last one before or after this iron was laid? A. It was after.” The defendant moved to strike out the answers of the witness as to the two wrecks before and after the accident in question as immaterial and irrelevant, which motion was refused, and the defendant duly excepted. We think the testimony was improper, and should have been rejected. These two wrecks were too remote, both in time and place, from the wreck in question; and besides, it was not shown from what cause they occurred. They have no proximate relation to the condition of the track at the time and place of accident. No fact was stated by this witness as a ground for his opinion that it was a broken rail that caused the wreck, and we have no intimation as to the grounds of his belief. That there was a broken rail, and that the wreck was caused by it, were facts to be found by the jury; and the opinion of a witness, not based on competent facts, should not have been given to them. Aside from this “supposition” of the witness Farrel, who was himself injured at the accident, too much to take notice, there is no evidence that a rail was broken at all. Nor was the fact that in the fall of the same year, but more than eight months after the accident, the whole road was re-ironed, and heavier rails placed upon it, competent evidence of the cause of this accident. What the motive was is not shown by the act itself, or otherwise. There were many reasons, each of which is equally presumable, which may have induced this re-ironing; each of which reasons may have been wholly disconnected with any weak or ruinous condition of the track at the time and place of accident. Even granting that the road as a whole, eight or more months after the seventh day of January, 1886, required



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strengthening in view of the uses it was to be put to, still those defects may have been at great distances from the place of the accident, or from causes not at all existing at that place. Any possible relation of this evidence is too remote in character, time, and place from the acts in question. (*Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. 358.) This evidence may not have influenced the jury, but we cannot see that it did not.

A more serious error was in giving the first charge to the jury at the request of the plaintiff, that "if the car was overturned by reason of any defect in said car, or of the track on which it was running, . . . this is in itself presumptive evidence of negligence on the part of the defendant; and the burden is on the defendant to show that there has been no negligence whatever, and that the overturning has resulted from a cause which reasonable care and foresight could not prevent."

1. It was not any defect in the car that was in issue. Suppose the car had been derailed by a broken axle, that would raise no presumption that the track was ruinous and weak, or that the defendant had knowledge of its condition.

2. Nor was it "any defect" which the track might have which the jury were to consider, but only the defects charged. It was in evidence that the weather was very cold at that time and place—the thermometer was twenty-eight degrees below zero; also that broken rails are more frequent when the weather is cold. But no issue has been made upon a defect so caused; nor of the defendant's knowledge or want of knowledge of such defect. Yet the charge is that such or any other defect in the track is presumptive evidence of negligence of the defendant in what constituted "the real cause of the accident," whatever it was, and lays on it the burden of showing that there was no negligence whatever. That is very unreasonable. It is as though the jury were told the same thing in case an enemy had drawn the spikes, thereby causing the car to be derailed. It is impossible to see how such a fact, even if the jury thought the defendant careless in such a case, could be presumptive evidence of the defendant's negligence in letting its track become weak and ruinous.

The second charge was also equally erroneous. The court charged "that the burden of proof is upon the plaintiff to show

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the negligence of the defendant, but it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of defendant; and that the cause of that injury was probably the negligence of the defendant; and that whether it is so or not is in the knowledge of defendant, for then the defendant must show what the real cause of the injury was; and if the defendant does not choose to give the explanation, the jury would be authorized to find that the real cause of the injury was the negligence of the defendant in the particular case specified in the complaint." This is wrong for many reasons. It tells the jury that whatever may have been the cause of the accident, whether as alleged in the complaint, or from any other cause, however remote, if the defendant was "probably" negligent in it, then the jury, without any further proof, may find against the defendant on the facts in issue. To show that the plaintiff was injured by a broken axle; that such axle, on inspection, appeared much worn, and that the defendant probably knew it; or that the engineer was probably intoxicated, and so caused the accident—certainly could raise no presumption as to the condition of the track, nor of the company's knowledge of that condition. The company may be equally ignorant with the plaintiff as to what the jury may think is "probably" the "real cause" of an accident, or of what is in fact "the real cause." But this instruction is to the effect that, whether the company has or has not any knowledge, if still it is probably negligent in something else, which might have been the cause of the accident, it must nevertheless show what the real cause was, or the case as charged will stand confessed. No rule of law, we think, will sustain that position. (Wood on Master and Servant, sec. 419; Wharton on Negligence, sec. 421; *Railroad Co. v. Scott*, 64 Tex. 549; note to *Railroad Co. v. Brice*, 1 S. W. 483, 28 Am. & Eng. R. R. Cas. 551; *Ely v. Railway Co.*, 77 Mo. 34.)

A point is made by the defendant that the plaintiff at the time of the accident was riding on a pass, which had conditions that in case of injury to the holder would protect the defendant from liability. The effect of such a provision upon a pass is not, under the evidence, a question in this case. The pass was apparently adopted by both parties as a convenient way to carry

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out a contract of employment. The terms of that pass were no part of that agreement. Its object was only to enable the plaintiff, by its means, to pass over the road. The agreement was that the plaintiff should serve the defendant as its traveling auditor; go from station to station on this and other lines of road, upon the cars of defendant, without charge to the plaintiff; for which he was to have an agreed compensation. With or without the pass he was to do, and would have done, so far as appears, precisely what he was doing at the time of the accident. He was a servant of the company, on duty in the defendant's business, and riding upon and under his contract of employment, but of which contract neither the pass nor its conditions were a part. The relations between the parties were those of master and servant, and the only rule of the liability of the defendant to the plaintiff is the rule of the liability of the employer to the employee. That rule is "that when a servant enters into the employ of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment; and he cannot recover for injuries resulting from such ordinary risks." (Wood on Master and Servant, sec. 326; *Noyes v. Smith*, 28 Vt. 59, 65 Am. Dec. 222.) The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part; and he is met with two presumptions, both of which he must overcome, in order to entitle him to a recovery: 1. That the master discharged his duty to him by providing suitable instrumentalities for the business; and this involves something more than proof of the mere fact that the injury resulted from a defect in those appliances. The burden is imposed on him of showing that the master had notice of the defect, or that, in the exercise of ordinary care, which he is bound to observe, he would have known it. 2. When this is established, he is met by another presumption, the force of which he must overcome, and that is that he assumes all the ordinary hazards of the business. To overcome this presumption he must show that the injury did not arise from an obvious defect in the instrumentalities of the business, or from hazard incident to the business, or from causes known by him to exist,

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Points decided.

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or which he might have known by the exercise of ordinary care. Failing to overcome these presumptions, he cannot recover. (Wood on Master and Servant, sec. 382, and cases cited.) The jury in this case should have been so instructed, instead of being permitted to act upon the instruction given to them by the court. There was no evidence in the case to overcome either of these presumptions; and for this, as well as for the other reasons above stated, the judgment must be reversed. Judgment reversed, and a new trial ordered.

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(March 11, 1889.)

UNITED STATES v. KUNTZE.

[21 Pac. 407.]

**TIME AND PLACE OF HOLDING COURT—POWER OF JUDGES TO FIX.—**

The judges of the district court have power when assembled at the capital to fix the time and places for holding court in their respective district.

**SAME—WHERE UNITED STATES IS A PARTY.—**They also have the power to fix the time and places for holding terms of court for the trial of causes where the United States is a party, or where such cause arises under the constitution and laws of the United States.

**VENIRE—JURORS—MARSHAL.—**In such cases it is proper to issue the venire to the marshal of the United States, directing him to summon jurors from the body of the district at large.

**INDICTMENT—BIGAMY—COHABIT.—**In an indictment under section 3 of the act of Congress, approved March 22, 1882, chapter 47, entitled "An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy and for other purposes," the use of the word "cohabit" is sufficient, and it is not necessary to set out at large in the indictment the meaning or definition of the word itself. In the trial of a cause arising under said section the prosecuting attorney referred to the fact that the defendant had failed to testify as a witness in his own behalf when he had the right to do so. This is held error, but is cured by the court subsequently, at the request of the defendant, charging the jury in substance that the fact that the defendant did not testify in his own behalf should not in any manner be considered by the jury as a circumstance against him.

(Syllabus by the court.)

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Opinion of the Court—Logan, J.

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## APPEAL from District Court, Bingham County.

Smith &amp; Smith, for Appellant.

There is no such crime known to the laws of the United States as "unlawful cohabitation," nor is there such a crime as "cohabitation." The time of holding the district courts, as well as the place, is fixed by the judges of the supreme court; but they must be held in the "several counties or subdivisions" of the district. (U. S. Rev. Stats., sec. 1914.) To convict under the indictment, it was incumbent on the government to prove two principal facts: 1. That the defendant lived (cohabited) with the two women named in the indictment; 2. That a marriage, real or ostensible, with each of these women, had preceded this cohabitation. (U. S. Rev. Stats., sec. 1865.)

James H. Hawley, United States District Attorney.

The word "cohabit," when used in a criminal statute, means "together as man and wife." (Idaho Rev. Stats., sec. 7684; Webster's Dictionary, 284; *Cannon v. United States*, 116 U. S. 74, 6 Sup. Ct. Rep. 278.) While this court has the power to set terms of court in each of the counties of the territory, it would still have the right to determine in which of said counties United States business should be transacted. (U. S. Rev. Stats., sec. 1910; U. S. Rev. Stats., sec. 1874.)

LOGAN, J.—The defendant was indicted by the grand jury at Blackfoot, Idaho territory, in October, 1887, for a violation of section 3 of the act of Congress approved March 22, 1882, chapter 47, entitled "An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy and for other purposes." The section reads as follows: "Sec. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than \$300, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." The defendant was tried and convicted at the June term, 1888, of the district court of Bingham county,

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for a violation of the preceding section, and sentenced to suffer the extreme penalty of the law, and from that judgment he has appealed to this court.

The indictment referred to reads as follows: "Samuel Kuntze is accused by the grand jury of the United States within and for the third judicial district of Idaho territory, duly summoned and impaneled upon their oaths, by this indictment, of the crime of unlawful cohabitation, committed as follows, to wit: The said Samuel Kuntze, at Bear Lake county, within said third judicial district of Idaho territory, on the first day of December, A. D. 1884, and thereafter, on divers other days, and continuously from the said first day of December, A. D. 1884, up to and including the day of finding this indictment, did unlawfully cohabit with more than one woman, to wit, with Mrs. Samuel Kuntze and one Caroline Wuthrick, against the peace and dignity of the United States, and contrary to the form, force and effect of the United States statute in such case made and provided." To this indictment the defendant demurred upon the ground that the same did not state facts sufficient to constitute an offense, in this: That it charges a mere conclusion of law; that it did not state whether he cohabited with the two women named as his wives or otherwise; and that the court, being a district court for Bingham county, had no jurisdiction of the offense attempted to be charged, it being alleged to have been committed in Bear Lake county. The demurrer was overruled by the court below, which decision is assigned as error by the defendant.

The first objection goes to the meaning of the word "cohabit," used in section 3 of the act, and also in the indictment. This word has several meanings, as defined by Webster and Worcester, and among its definitions we find that it is defined, "To dwell or live together as husband and wife"; and this unquestionably is the sense in which it is used both in the statute and in the indictment. The context in which it is found, and the manifest evils which gave rise to the statute in regard to cohabitation, require that the word should have the meaning assigned to it. (*Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. Rep. 278.) Taking the meaning of the word as defined, and the manner in which it is used in the indictment, we think it is

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sufficient to charge the defendant with the crime he is alleged to have committed. Certainly, the defendant was fully aware of the nature of the offense with which he was charged; and, taking into consideration sections 7684 and 7686 of the Revised Statutes of Idaho, we think the indictment is sufficient.

The second objection is practically disposed of by this court when it has disposed of the first objection. At any rate, it becomes more a question of evidence than of law, if the meaning of the word "cohabit" is to be in the sense used. The opinion of the supreme court is very full upon this subject, as will appear on page 71 of *Cannon v. United States*, 116 U. S. Although it is true that this case cannot be considered as authority, yet the opinion of the court upon the questions raised is of as much value as if the case was of the most binding authority.

The third objection goes to the jurisdiction of the court, and the construction of the jury by which the defendant was convicted. No question is raised as to the manner of drawing the grand jury, for the reason that the manner of their drawing does not appear to the court. The question is raised, however, as to the power of the court to summon such grand jury from the district at large, and the right of the United States marshal to execute the process. The same questions are raised in regard to the trial jury, and we will consider and dispose of both the questions at the same time.

The only question involved is the power of the court to hold sessions of court for the trial of causes arising under the constitution and laws of the United States in one designated place in the judicial district. The organic act, section 1914, provides that the time of holding the district courts, as well as the places, shall be fixed by the judges of the supreme court when assembled at their respective seats of government. Section 1874 of the organic act provides that the judges of the supreme court in each territory of the United States are hereby authorized to hold court within their respective districts in the counties wherein, by the laws of said territory, courts have been or may be established, for the purpose of hearing or determining all matters and causes except those in which the United States is a party. The act of March 2, 1867, passed with espe-

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cial reference to Idaho territory, provides that the judges of the supreme court of said territory, or a majority of them, shall, when assembled at the seat of government of said territory, define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts, and shall also fix the times and places for holding court in the several counties or subdivisions in each of such judicial districts, and alter the times and places of holding the courts as to them shall seem proper and convenient. It would certainly seem fair to conclude from these acts that the judges, as provided by law, may so arrange the time and place for holding court for the trial of causes in which the United States is a party at such place or places in the district as they may think proper and convenient. The place for holding court in the third district was fixed at Blackfoot, Bingham county. We think the court had this power. (*Huston v. Heed*, 1 Idaho, 402.)

The selection of jurors by the marshal from the body of the district under open *venire* directed to him was made the subject of challenge by the defendant, which challenge was overruled by the court. We are referred to the case of *Clinton v. Englebrecht*, 13 Wall. 434, as decisive of this point in favor of the defendant. This case is not at all in point. It was a civil case, arising under the laws of Utah, and did not fall within the jurisdiction of a district court fixed for the trial of such issues. The law of the territory of Utah had provided a mode of selecting and returning jurors, which was openly disregarded by the district court, and for this error the judgment was reversed. The case at bar is founded upon the statute of the United States, and appertains to the federal jurisdiction of the court, and differs materially from that decided by the supreme court in the above case. No provision has been made by the legislature of this territory for selecting or summoning jurors for the trial of cases arising under the laws and constitution of the United States, or in which the United States is a party, and it would seem that in the absence of any territorial law the court had the common-law power to proceed in the manner in which it did, and this position is supported by undoubted authority. (*Beery v. United States*, 2 Colo. 186; *Huston v. Heed*, 1 Idaho, 404; *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505;



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*McCann v. United States*, 2 Wyo. 275; *Bennet v. United States*, 2 Wash. Ter. 179, 3 Pac. 272.) The marshal being the executive officer of the court when sitting for the trial of causes in which the United States is a party, and performing essentially the duties of a sheriff at common law, it is no objection that the selection of the jurors was intrusted to him; for, by the common law, he was clothed with authority to that end. (*Beery v. United States*, *supra*.) We think, therefore, that no error was committed by the court below in its disposition of the demurrer and challenges to the grand and trial juries.

The defendant requested the court to instruct the jury that in this case the evidence did not warrant a verdict of guilty, and that it was their duty to return a verdict of not guilty. The court was right in declining to give this instruction. There was some evidence in the case tending to prove the guilt of the defendant, and sufficient to authorize the court in submitting the case to the jury, and, the jury having found a verdict upon the evidence, we are not inclined to interfere with their verdict.

The refusal of the court to give the first instruction requested by the defendant was not error. The court charged the jury that, when a person is charged with an offense, his flight or hiding will not of itself warrant a conviction, but it may be proven as a circumstance to be considered with the other evidence in the case. This, we think, was sufficient and justified by the evidence, and consequently it became unnecessary thereafter to charge as requested by the defendant upon the same point. (*People v. Forsythe*, 65 Cal. 101, 3 Pac. 402; *People v. McDowell*, 64 Cal. 467, 3 Pac. 124.)

It was manifestly improper on the part of the district attorney to have referred to the fact in any way in his address to the jury that the defendant had failed to testify in his own behalf. He should not have called the attention of the jury to that fact. But as it appears subsequently that the defendant requested the court to instruct the jury that the failure of the defendant to testify as a witness in his own behalf should not be taken into consideration by the jury in arriving at their conclusion in this case, and is not to be considered as a circumstance against him, and it appearing that the court did so instruct the jury, all of which took place subsequent to the re-

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marks made by the district attorney, we fail to see in what manner the defendant was injured by such remarks. The error on the part of the district attorney was cured by the act of the defendant, and of the court in the charge above referred to. We do not deem it necessary to notice particularly any other exception taken by the defendant in this case. It is sufficient to say that we find no error in the record calling for a reversal of the judgment. The judgment is therefore affirmed.

Weir, C. J., and Berry, J., concurring.

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(March 11, 1889.)

## UNITED STATES v. COZZENS.

[21 Pac. 409.]

APPEAL from District Court, Bingham County.

Judgment affirmed. Following case of *United States v. Kuntze*.

One Cozzens was convicted of bigamy, and appeals. Affirmed.

Smith & Smith, for Appellant.

J. H. Hawley, United States District Attorney.

LOGAN, J.—Under a stipulation now on file with the clerk of this court, and upon the opinion of this court in the case of *United States v. Kuntze*, ante, p. 480, 21 Pac. 407 (decided at this term), the judgment in this action is affirmed.

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Argument for Respondent.

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(March 11, 1889.)

## DRAKE v. UNION PACIFIC RAILWAY COMPANY.

[21 Pac. 560.]

**MASTER AND SERVANT—RULE OF DAMAGES.**—Where a fireman upon a locomotive engine in discharge of his duty, with full knowledge of the nature and extent of the dangers of the service he is engaged in, or has the means of being informed of such facts and conditions by the exercise of ordinary care, voluntarily assumes such risks, and is thereby injured, and the employees are guilty of no laches or misconduct unknown to the servant, or which with ordinary care he might have known, he cannot recover for such injury.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

P. L. Williams and W. H. Savidge, for Appellant.

An instruction is vicious which ignores a qualification which the evidence tends to prove. (*Railway Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 265, 269.) A railway company is not held to be an insurer of the safety of its employees, even as to the agencies within its control; *a fortiori*, it ought not to be held to this rule as to agencies without its control. (*Railway Co. v. Fowler*, 8 Am. & Eng. R. R. Cas. 504, 509; *Pierce on Railroads*, 379, cases cited; *Gibson v. Railway Co.*, 63 N. Y. 449, 20 Am. Rep. 5521; *De Forest v. Jewett*, 88 N. Y. 264; *Wood on Master and Servant*, sec. 382; *Railway Co. v. Bresmer*, 4 Am. & Eng. R. R. Cas. 647, 650.)

Smith &amp; Smith and R. D. Winters, for Respondent.

Under the evidence, as introduced, it was the duty of the court to submit the question of defendant's negligence to the jury. (*Jones v. Railway Co.*, 128 U. S. 443, 9 Sup. Ct. Rep. 118; *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Hough v. Railway Co.*, 100 U. S. 224; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884.) The defendant was bound to keep its track in safe condition, and to use all reasonable means to keep obstructions off the track, and to discover any that may by chance get thereon, and remove them.

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(*Wilson v. Railway Co.*, 15 Am. & Eng. R. R. Cas. 192; *Illinois Cent. Ry. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Railway Co. v. Gregory*, 58 Ill. 272; *Chicago etc. Ry. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Fifield v. Railway Co.*, 42 N. H. 225; *Dorsey v. Construction Co.*, 42 Wis. 583.) This action was maintainable, and was properly brought in Idaho for a liability arising under the statute of Wyoming. (*Dennick v. Railroad Co.*, 103 U. S. 11.)

BERRY, J.—This is an appeal from the district court of the third judicial district, Bear Lake county, tried by a jury at the July term, 1888, Honorable Case Broderick, district judge, presiding. The action is brought by the plaintiff as administrator of one Fred. S. Drake, deceased, who was killed in an accident on the Oregon Short Line Railway, one of the lines of the defendant, at a point near Ham's Fork, in Wyoming territory, January, 28, 1887. The complaint alleges that the deceased was employed by the defendant at the time as a fireman on one of its locomotive engines; that at the place of the accident "the track of the said road was out of repair, and unfitted for the passage of trains, by reason of ice and snow, which the defendant had negligently permitted to remain on the track"; that the defendant, with knowledge, etc., willfully and carelessly ran its train and engine over said track, whereby the deceased, without fault on his part, was killed; that the deceased was ignorant of the condition of said track, or that it was out of repair, or unfit for use. The plaintiff demands judgment as administrator, and pleads the statute of Wyoming territory, where the accident occurred, as allowing recovery by an administrator. The answer of the defendant puts in issue each allegation of the complaint. On the trial, when the evidence on the part of the plaintiff was closed, and the plaintiff had rested his case, the defendant moved for a judgment of nonsuit, under section 4354 of the Statutes of Idaho, subdivision 5, on the ground that the plaintiff had failed to prove a sufficient case for the jury. The motion was denied, and the defendant excepted.

Certain requests were made by the defendant to the court to charge the jury (which requests will hereafter be referred to

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more at length), each of which was refused by the court, and to which refusal the defendant duly excepted. The court delivered its charge to the jury, which was also excepted to by the defendant, as will more fully appear, and the jury found a verdict for the plaintiff in the sum of \$3,000. A bill of exceptions and a case were duly settled and allowed, and upon which a motion was made for a new trial, which motion was denied, and judgment on said verdict was entered for plaintiff; and the defendant appeals from such order of refusal and from the judgment to this court.

The first point of the appellant is that the court erred in refusing judgment of nonsuit. That motion was based upon the want of evidence, and the ground is taken that the evidence did not show such a state of facts that the jury could find the defendant liable. It is stipulated that the case before us contains all the evidence. A review of this point involves an examination of the facts of the case. There is little or no conflict between the witnesses on any material point. Stated as strongly for the plaintiff as the evidence will warrant, they are about as follows: The deceased is alleged in the complaint to have been at the time of the accident in the employ of the defendant as fireman on one of its locomotive engines; and the evidence shows that this employment was on and over this division of the road, on its regular trains, and that he had been so employed for some years; that he ran between Montpelier, in Idaho, and Granger or Green River, in Wyoming territory, with his headquarters at Montpelier, and on each trip passed over the place of the accident; that the train on which he was regularly employed and running was stopped, either the day of the accident or the preceding day, while going east, in consequence of the snow on the track, and difficulty of running, in consequence of the drifted condition of the roads, at a station called Fossil, about ten miles west of the place of the accident; that other trains, from both directions, had stopped there, and the running of regular trains had been practically suspended, since early in the morning of the accident; that at 12:15 P. M. of that day a special train was made up of passenger cars, to be drawn by two engines, the train so made up being what is known as a "double-header," to be sent from Fossil east over

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this line, both to forward the train, and also thereby open and clear the track of the drifted snow; that the second engine was the one on which the deceased was accustomed to run, but on which, on that occasion, another engineer than the usual one was placed; it was a special provision, for a special duty, made necessary by the drifted snow; that no snow-plow was sent ahead of this train, but that this "double-header," as admitted on the argument, and in the respondent's brief, was sent out to "buck the snow." It is also shown that the officers of the company, and the trainmen at Fossil, had knowledge of the storm of wind and snow that had commenced about three days previous to the 28th of January. From the circumstances, in the absence of proof, they are presumed to have known it; and of the presence of drifts upon the line; and of the difficulty of running in consequence; and of the delayed and deranged conditions of the trains; but not that this place of the accident was in any way specially dangerous, above other places in its vicinity; and it was not shown that the track at this point was in any way defective; and also it was shown that the accident was on account of the engines running into a drift at that point, at a speed of about twenty-five miles an hour. It was shown that the weather was unusually cold—some degrees below zero—and had been cold for a day or two previous to the wreck; that the presence of a drift at the place of the accident was on account of the wind blowing from an unusual quarter; that the altitude was about seven thousand feet; the country extremely hilly and rough; that service in "bucking snow-drifts," whether by snow-plow or otherwise, is considered by railroad men as extrahazardous. There was other evidence, but not to materially affect either of these facts. Had this action been for injury to a passenger, instead of to an employee, much of this evidence would have had no bearing, except upon the question of knowledge on the part of the defendant; but being by the representative of an employee, and under the circumstances shown, it involves, or tends to show, the knowledge, or means of knowledge, of the deceased, of the causes of the accident, and the quality and degree of risks which the deceased voluntarily assumed, and for which the defendant might not be liable.

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It is not claimed that there was any promise to indemnify the deceased, or to do anything to insure safety; nor that the deceased made any request or protest; or that the company had any knowledge, which the deceased did not have, or might not have had, if he had desired. Under such evidence, it is difficult to see how the company could have been found liable in damages for the death of the deceased. It is by no means clear that the motion for nonsuit should not have been granted. We think it should have been allowed. But, if this were not so, the law as to the risk assumed by the employee should have been given to the jury, and the distinction in the obligation of the defendant, in cases of a mere passenger and of an employee, engaged in this service, under the circumstances of this case, and as to his knowledge, or want of knowledge, of the facts constituting this danger, and as to his assent, or his want of assent, to the assumption of the danger, should have been stated.

The judge charged, at the plaintiff's request: "1. That if the jury find from the evidence that the said railway track was obstructed with ice and snow; that this caused the wreck of the train on which Fred. S. Drake was riding; that in such wreck he was killed without fault on his part; that the defendant's roadmaster or superintendent, or both of them, had notice of said obstructions in time to remove the same, or in time to have prevented the said train from running into or upon such obstructions, by the use of ordinary diligence, under all of the circumstances of the case—then your verdict should be for the plaintiff; 2. In this case it is admitted that Fred. S. Drake lost his life at the time and place alleged in the complaint; and the first question for your consideration is whether there was negligence on the part of the defendant company. The defendant was bound to use ordinary care in keeping its track in a safe condition. If it failed after notice to do it, in this instance, then it is liable; but if, under all the attendant circumstances, you are not satisfied from the evidence—that is, by a preponderance thereof—that the company was negligent, then it is not liable in this action, and you are the exclusive judges of the evidence and facts." These charges are erroneous, both in what they contain, and in what they do not contain. The case was not the case of a passenger riding upon a train, and the

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jury should not have been induced to so consider it. The court adopted a wrong theory of the nature of the rights and obligations of the parties, respectively, and both charges are consistent with such wrong theory. How well soever it may have suited the case of an injury to a mere passenger, it was misleading when applied to this case; and, as we have before said, the learned judge should have given the law as to the liability of the defendant to its employee, under the circumstances of the case on trial. This the charge does not do, but, so far as it assumes to give a rule, it is erroneous.

The defendant further requested the court to charge "that if, in this case, the jury find from the evidence that, at and near the point of the wreck resulting in the death of Fred. S. Drake, and at the date of its occurrence, there had been recent storms and snowfalls in various places on the track of said railway, thereby increasing the risks and dangers to trainmen and others in going over said portion of said road, and the deceased had knowledge or the means of being informed of said conditions, by the exercise of ordinary diligence, and notwithstanding he continued in said employment until he received the said injury resulting in his death, in consequence of the said dangers, then the plaintiff cannot recover in this action." This request was refused, but, in our opinion, should have been given especially, as qualifying what was actually given, and its refusal as error. The rule as to risks assumed by an employee, and the liabilities of the employer, as to injury to the servant while on duty in such employment, is, in effect, stated in *Pierce on Railroads*, 379, that a servant who, before the injury, had knowledge of the special risks and dangers of the service, or who, having reasonable opportunities to inform himself, ought to have known the facts constituting such risks and dangers, by remaining in the company's service is presumed to have assumed the risk of such voluntary exposure of himself; and he cannot recover for an injury resulting therefrom; and his knowledge has the same effect, whether the employer was informed or was in fact ignorant of such danger; and the rule applies with special force when the danger is obvious to the senses, as in this case, and where the servant was voluntarily assuming the task of removing the very obstructions complained of. (2 *Thompson on Negligence*,



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Points decided.

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p. 1008, sec. 15; *Railway Co. v. Fowler*, 8 Am. & Eng. R. R. Cas. 504; *Gibson v. Railroad Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *De Forest v. Jewett*, 88 N. Y. 264; Wood on Master and Servant, sec. 379.) The judgment and order overruling motion for a new trial should be reversed, and a new trial granted. Judgment set aside, and new trial granted, costs to abide the event.

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(March 11, 1889.)

UNITED STATES EX REL. McDONALD, DISTRICT ATTORNEY, v. SHOUP ET AL.

[21 Pac. 656.]

**PARTIES TO ACTION—COUNTY MUST BE SUED IN CORPORATE NAME.—**

An action by a county must be in its corporate name. Since the 1st of June, 1887, the date when the Revised Statutes of Idaho went into effect, an action for the benefit of a county, and where the demand sued upon is a property of the county, must be in the corporate name of the county.

**REFORMATION OF INSTRUMENT SUED ON.—**A bond payable to the people of the United States will not sustain a judgment in favor of the people of the United States of the territory of Idaho. Before such judgment can be allowed, the instrument must be reformed.

**GENERAL DENIAL—UNVERIFIED COMPLAINT.—**A complaint by a public officer, in his official capacity, need not be verified, but the answer to it must be verified, unless it also be by a public officer in his official capacity, but if the complaint be not in fact verified, a general and not specific verified answer may put in issue the main allegations of the complaint under section 4183 of the Revised Statutes.

(Syllabus by the court.)

**APPEAL** from District Court, Lemhi County.

This is an appeal from the judgment of the district court in and for Lemhi county, rendered April 26, 1888, in favor of the plaintiffs, and against the defendants severally, in the sum of \$500 each. The action was commenced July 14, 1887. The defendants on the twenty-eighth day of December, 1887, ap-

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Argument for Appellants.

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peared by their attorney, C. A. Wood, Esq., and filed a demurrer to the amended complaint, which amended complaint had been filed on the nineteenth day of that month. The complaint set up a bond executed by the defendants, November 26, 1886, in the penal sum of \$2,500, which the defendants promised to pay in sums of \$500 each, conditioned for the appearance of one Thomas McKinney, to answer to a criminal charge, in whatsoever court, etc., and to hold himself amenable to the orders, etc. The proceedings in which the bond is taken were regular, and authorized the taking of such bond as plaintiffs say this was intended to be. The bond was in form as described by section 499 of the Criminal Code of Idaho territory (Revised Laws, 8th Sess.), except that it was, by its terms, payable to "the people of the United States," instead of to "the people of the United States of the territory of Idaho." The complaint, which was not verified, admits this deficiency, but alleges that the defect was caused by mistake of all parties to it; and that the prosecutor and all the defendants intended it to be in statutory form; and prays that (1) the bond be reformed by adding to it, after the words "United States," the words "of the territory of Idaho," as the obligees of said bond; (2) that the plaintiffs have judgment upon the bond. To this complaint the defendants demurred, and state, as grounds of demurrer: 1. That the plaintiffs have not the legal capacity to sue; 2. that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and the defendants excepted; whereupon the defendants answered as follows: The defendants, in answer to the complaint of the plaintiffs herein, "deny each and every allegation therein contained," which answer was duly verified. On the twenty-sixth day of April, 1888, the plaintiffs by their counsel, said district attorney, moved for judgment on the pleadings, on the ground that the answer was only general, and not a specific denial of the allegations of the complaint. The motion was sustained, and judgment was entered against the defendants in the sum of \$500 each; to all of which the defendants excepted.

Charles A. Wood, for Appellants.

If a condition prescribed by statute is omitted, the bond is void, although the surety is benefited. (*Alexander v. Bates*, 33

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Argument for Respondents.

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Ga. 125; *State v. McCown*, 24 W. Va. 625.) If the recognition is not authorized by law, or if the court had no authority to take it, it is void. (*Keppler v. State*, 14 Tex. App. 173; *Phelps v. Parks*, 4 Vt. 488; *Nicholson v. State*, 2 Ga. 363.) If the answer was sham or frivolous, or improper for any other reason, it should have been stricken out; but so long as the answer remained on the records, denying any of the material allegations of the complaint, the court had no authority to order judgment on the pleadings. (*Reich v. Mining Co.*, 3 Utah, 254, 2 Pac. 703; *Prost v. More*, 40 Cal. 347; *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942.)

R. Z. Johnson, Attorney General, and Henry Z. Johnson, (James H. Hawley, of Counsel), for Respondents.

As the complaint shows that the defendants secured the discharge of their principal by the execution of the bond in question, neither said principal nor the defendants were prejudiced by the clerical error in the bond. (*People v. Myers*, 1 Idaho, 357; *Huffman v. Koppelkom*, 8 Neb. 344, 1 N. W. 243; *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577; *State v. Soudriette*, 105 Ind. 306, 4 N. E. 860; *Gorman v. State*, 38 Tex. 112, 19 Am. Rep. 29; Murfree on Official Bonds, sec. 62.) The sureties cannot set up as a defense the fact that the amounts in which they justified were insufficient under the statute. The justification is no part of their contract. (*People v. Carpenter*, 7 Cal. 402; *People v. Shirley*, 18 Cal. 121; *People v. Penniman*, 37 Cal. 271; *Murdock v. Brooks*, 38 Cal. 603; Brandt on Guaranty and Suretyship, secs. 439, 440.) Although the complaint was not verified, the territory being plaintiff, the statute required the defendants to verify their answer. (Rev. Stats., sec. 4199.) A general denial in a verified answer is sham and frivolous, and may be stricken out or disregarded. (*People v. Hagar*, 52 Cal. 171, 175, 182; *Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388.) Whenever the answer fails to deny any of the material allegations of the complaint in such form as to put the same in issue, the plaintiff is entitled to judgment upon the pleadings. (*Doll v. Good*, 38 Cal. 287; *Fitzgibbon v. Calvert*, 39 Cal. 261; *Felch v. Beaudry*, 40 Cal. 443.)

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Opinion of the Court—Berry, J.

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BERRY, J. (After Stating the Facts.)—The first question is whether the action is brought in the name of the proper plaintiff. It is conceded that the county of Lemhi, Idaho territory, is the party in interest, and for whose benefit the action is brought. Whatever was the practice as it stood prior to the first day of June, 1887, the statutes on which that practice rested were either repealed, or superseded, by the Revised Statutes, which went into effect June 1, 1887. By section 4090 all actions must be brought in the name of the party in interest. By section 1732 all acts respecting the property and rights of the counties shall be in the names of the respective counties. And by section 1733 counties may sue and be sued. It seems, therefore, that the county is not only authorized to sue in its own name, but is required to do so; and that this action should have been brought in the name of Lemhi county. But it is objected further that the bond does not run to the county of Lemhi, or even to the people of the territory of Idaho, but to the people of the "United States," and that such a bond was unauthorized by the laws; that as to the meaning of the parties to this bond the court cannot from the words alone take judicial knowledge that the bond was intended to run otherwise than it was in fact drawn. The bond, if a judgment was to be rendered upon it in favor of the people of the territory of Idaho, or for the benefit of Lemhi county, should have been reformed. It was not reformed; and, as it stood when judgment was rendered, would not sustain a judgment in favor of the people of the United States in the territory of Idaho. A bond in this form was unknown to the laws; and only on reformation could it have any validity whatever. But it is claimed that it is alleged in the complaint that it was the intention of all parties to it to make it payable as provided by section 498 of the Laws of the Eighth Session, and that such fact is admitted. Even if such were the case (which the defendants do not admit), the bond should have been reformed as prayed in the complaint, before a judgment should have been rendered. In some way it should appear in the action of the court that the promise was for the benefit of the party demanding judgment upon such promise. There should have been a formal reformation of the

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Opinion of the Court—Berry, J.

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bond, even if, as the respondent contends, the answer was not sufficiently specific. But was not the answer sufficient to put in issue each material fact of the complaint? Whatever may be thought of the intention of the parties, we must still look to what they did, and for this, first, to the pleadings. The allegations of the complaint are that by mutual mistake there was a defect in stating in the bond the name of the obligee; and which allegation, if adjudged to be true, might cure that alleged defect in the judgment. The answer, as to every material allegation in the complaint (Idaho Rev. Stats., secs. 4183, 4184), is good, as a general denial. But it is not a specific denial of each allegation controverted; hence, if the complaint is verified, the answer is open to the objection of insufficiency. The learned judge in the court below seems to have taken the view that the complaint was verified, and that the answer should be wholly disregarded. While it is not specifically stated for what cause he ignores the answer, we may suppose it was for want of compliance with the statute (section 4183), in not being specific in denial of each material allegation of the complaint controverted. If such holding is correct, it must be for the reason that in this case a general answer is denied to the defendants. Section 4199 of the Revised Statutes provides that when an action is brought in the name of an officer of the territory, and for the public, the complaint need not be verified; but the defendant, unless he also be an officer, or answering in his official capacity, must verify his answer. The statute goes no further on that point than merely to excuse such officer from verifying his pleading, and of requiring unofficial parties to verify. The statute does not "verify the complaint," as the respondent claims. The officer is excused from verification for reasons growing out of the fact that his relations to the subject matter are official, and not personal. If he desires, he may verify; and then his pleading will be a verified pleading, and will entitle him to whatever advantage may result from that fact. But if he do not verify, his pleading, for all purposes, except as to the single matter of verification alone, differs in nothing from an ordinary unverified pleading. In this case the defendants were entitled to interpose either a general or specific

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Argument for Appellant.

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denial of the material allegations of the complaint, controverted by the defendant. (Rev. Stats., sec. 4183, subd. 1.) The answer was good, and the action of the court below was therefore error. From the view taken of the points here noted, it is apparent that the judgment cannot be sustained. Judgment reversed.

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(March 11, 1889.)

SMITH v. RICHARDS ET UX.

[21 Pac. 419.]

**JUDGMENT LIEN ON HOMESTEAD—EXECUTION.**—A judgment lien acquired before the filing of a declaration of homestead by respondent and wife subjects such property to sale under execution. Such lien cannot be divested by any subsequent act of the owners. **SATISFACTION OF JUDGMENT.**—A judgment lien is a vested right of property, and cannot be satisfied except by payment or release.

(Syllabus by the court.)

APPEAL from District Court, Oneida County.

Smith & Smith, for Appellant.

The lien of a judgment gives to the judgment creditor a vested right of property in the land to which it attaches. (*Gunn v. Barry*, 15 Wall. 622; *Edwards v. Kearzey*, 96 U. S. 595.) Neither occupancy, where that alone is necessary, nor recording a declaration of homestead, where that is required, will in any way affect or modify a judgment lien. (Thompson on Homesteads and Exemptions, secs. 317, 318; *Kelly v. Dill*, 23 Minn. 435; *Bullene v. Hiatt*, 12 Kan. 98; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Bartholomew v. Hook*, 23 Cal. 278; *Rix v. McHenry*, 7 Cal. 89; *Elston v. Robinson*, 21 Iowa, 532.) A subsequent setting off of a homestead does not detach a judgment lien that had already attached. (Freeman on Executions, pp. 390, 391, sec. 249; *Kankin v. Scott*, 12 Wheat. 177; *Goodwin v. Investment Co.*, 110 U. S. 1, 3 Sup. Ct. Rep. 473; *McComb v. Thompson*, 42 Ohio St. 139.)

D. W. Standrod and J. T. Morgan, for Respondents.

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Opinion of the Court—Logan, J.

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Under the laws of this territory a judgment does not become a lien upon the homestead premises. It can become a lien only upon real property of the judgment debtor which is not exempt from execution. (Code Civ. Proc. 1881, sec. 425; *Bowman v. Norton*, 16 Cal. 219, 220; *McDonald v. Badger*, 23 Cal. 400, 83 Am. Dec. 123; *Williams v. Young*, 17 Cal. 403; *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516.) After the selection of the homestead is made and filed for record, no levy upon or sale of the homestead property can be legally made, except for purchase price, mechanic's lien, etc. (*Hawthorne v. Smith*, 3 Nev. 182, 185, 93 Am. Dec. 397; *Estate of Walley*, 11 Nev. 264; *Lachman v. Walker*, 15 Nev. 425; *Stone v. Darnell*, 20 Tex. 14; *Macmannus v. Campbell*, 37 Tex. 267; Smyth on Homesteads and Exemptions, secs. 176, 180; *Green v. Marks*, 25 Ill. 224; *Hume v. Gossett*, 43 Ill. 299; *Bonnell v. Smith*, 53 Ill. 377.) If the judgment in this case became a lien for any purpose, such lien is postponed to the homestead right. (*Hoyt v. Howe*, 3 Wis. 752, 62 Am. Dec. 705; *Bowman v. Norton*, 16 Cal. 219; *Freeman on Executions*, sec. 249.)

LOGAN, J.—This is an action brought by the plaintiff against the defendants in ejectment. The action arose in Oneida county, and the same was tried upon an agreed state of facts. It appears from the findings of the court that on the seventeenth day of July, 1883, the plaintiff recovered a judgment against the defendant E. T. Richards, in the probate court of Oneida county; that on the same day an abstract thereof, made in conformity with the requirements of section 608 of the then Code of Civil Procedure of Idaho, was filed and docketed in the office of the clerk of the district court of the third judicial district of Idaho, in and for Oneida county; that on the same day a writ of execution was duly issued to the sheriff of Oneida county upon the judgment so docketed, and that under and by virtue of this writ the sheriff levied upon the real estate described in the complaint; that said real estate was then the property of the defendant, E. T. Richards; that by virtue of such execution the sheriff of the county advertised the said property, as required by law, for sale, and that, on the tenth day of September, 1883, the same was sold, and the plain-

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Opinion of the Court—Logan, J.

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tiff, being the highest bidder, became the purchaser of said property; that on the first day of April, 1884, the defendant, E. T. Richards not having redeemed the said premises, the sheriff executed to plaintiff a deed of conveyance of said land and premises; and that by virtue of this deed the plaintiff seeks to eject the defendants. The defendants, however, claim that on the third day of September, 1883—just seven days before the sale of the premises by the sheriff—Ann Richards, who was then the lawful wife of the defendant, E. T. Richards, by herself, filed, and caused to be recorded in the office of county recorder of said Oneida county her declaration of homestead, in the form and in all respects as required by law, upon the premises described in the complaint; that the defendant, E. T. Richards, with his wife and family, had resided upon the premises continuously for seven years last past from the date of the execution and recording of the declaration of homestead; and that they now have no other homestead or place of residence whatever. Under this state of facts the court found as conclusion of law that the defendants are entitled to the possession of all the land and premises described in the complaint herein as against the plaintiff and all persons claiming, or to claim, the same under him, and that the plaintiff had no right, title or interest in or to the said land, or any part thereof. It is claimed that this conclusion of law, as founded upon the facts, is error; and a reversal of the judgment is sought upon that ground.

The question presented for our consideration is, Can the defendant, or his wife, under the circumstances, by filing a declaration of homestead subsequent to the attaching of a judgment lien, divest that lien, and prevent the property being made subject to it? It is with some difficulty that we have been able to arrive at a satisfactory conclusion in this case. Such doubts have arisen mainly from a consideration of the decisions of the courts of Nevada and California. These cases appear to hold that the homestead itself is exempt from forced sale under execution, and that a subsequent filing of a declaration of homestead under the statute defeats the operation and effect of the lien. Although we are of the opinion that these cases do not go fully to that extent, yet, even if they do, we



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are not prepared to uphold the doctrine laid down therein. Freeman, in his work on Executions, sections 249, 249d, 249e, says, referring to the cases which we have mentioned: "These provisions clearly make it the duty of the officer to levy the writ on all property not then exempt from execution, and afterward, in the event of plaintiff's recovering judgment, to sell all the property attached, if necessary to produce a satisfaction of such judgment. We think, therefore, that, construing all the statutes together, it clearly appears that these decisions are wrong, and that, when an attachment is properly levied on lands not then exempt from attachment and execution, a lien is created which no subsequently arising exemption can supplant; and in so thinking we are sustained by a decided preponderance of the adjudications upon this subject." Thompson on Homesteads and Exemptions, section 317, says: "If a simple contract debt, created at a time when the creditor has not had the notice required by law—whether given by visible occupancy or a declaration of record—that the debtor has withdrawn a certain portion of his land from exemption by making it his homestead, will bind such homestead, *a fortiori* a valid lien placed upon land before it acquires the character of homestead will not be subsequently impaired by the debtor occupying such land as his homestead, or, in those states where such a proceeding is required, by filing the statutory declaration of homestead. If the legislature of a state cannot divest such a lien, it is pretty clear that a private individual can do no act which would have this effect. Plain as this conclusion would seem to be, the question has been thrust in the face of the courts again and again." Smyth on Homestead and Exemption, section 35, says "that, if the premises became a homestead after a lien has attached, this does not discharge or affect the lien"; and a "lien claimant, having a lien older than the homestead right, may enforce his lien without any reference to such homestead right." Platt on Property Rights of Married Women, section 71, says: "All liens acquired before the homestead has been established must be raised, or it will be subject to forced sale for their satisfaction." And again, in the same section, he says: "Consequently an appropriation of land as a homestead subsequent to the levy of an attachment or the attaching of a judgment

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Opinion of the Court—Weir, C. J.

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including that under the Speaker *pro tem.* and by him signed, and delivered them to Curtis, secretary of the territory, who received and receipted for them to said clerk. Speaker Burkhart petitions this court to issue a writ of mandate, directing Secretary Curtis to produce the record of the House to the court, that the court direct the record to be amended by the chief clerk to correspond to the facts and permit the said Speaker Burkhart to sign the same as Speaker. Held, that *mandamus* will not lie to inquire into the acts of a legislative body by verbal testimony, and cause its record to be corrected, or if there be no record to make one; and that a legislative journal can only be corrected by the body that made it.

Arthur Brown, Lyttleton Price, Texas Angel, and S. B. Kingsbury, for Petitioner.

R. Z. Johnson and Albert Hagan, for Respondent Reed.

James H. Hawley and John S. Gray, for Respondent Curtis.

WEIR, C. J.—This is an application by the plaintiff for a writ of mandate to be directed to the defendants above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which is as follows: "The above-named plaintiff, H. Z. Burkhart, shows that he was the duly elected Speaker, and is now the actual and acting Speaker, of the House of Representatives of Idaho; that defendant, Charles H. Reed, is chief clerk of the House of Representatives, and Edward J. Curtis is the secretary of the territory of Idaho; and for cause of action for *mandamus* alleges that the said defendant, Charles H. Reed, has in his possession, as such chief clerk, the minutes of the proceedings of said House of Representatives for the last day of the fifteenth session; that the same has not yet been signed by plaintiff, H. Z. Burkhart, the Speaker, and said defendant Reed refuses to present the same to said Speaker for his signature, but that said defendant Reed, in preparing a record of said minutes, omitted a part of the said proceedings; that in truth, on the sixtieth day of the said session, February 7, 1889, just before 12 o'clock P. M., the said Speaker inquired if there was any further business; that the clerk replied there was none; said Speaker then requested the journal

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Opinion of the Court—Weir, C. J.

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to be read, which was done by the clerk; that thereupon the proceedings, as recorded in said journal, were approved by the House of Representatives, and by said Speaker declared to be approved; that thereupon, the hour of 12 o'clock midnight having arrived and passed, the Speaker did, after said hour, declare and announce that the time having arrived when, by act of Congress, the session of the legislature must close, therefore he, as Speaker, thereby then and there declared said session closed and adjourned without day; that no objection was made by the House, or any member thereof, to the said adjournment, or to the authority of said Speaker to declare the same adjourned, but all acquiesced therein; that after the Speaker and a part of the members had retired from the room a portion of the members pretended to elect a Speaker *pro tem.*, to wit, one George P. Wheeler, and assumed and attempted to proceed with pretended legislation; that a large number of assumed and pretended bills were assumed to be passed by the said remaining members, and pretended to become the acts of the legislature; that all pretended proceedings on said last day after the Speaker retired were after 12 o'clock midnight, and after said House had been adjourned; that in preparing the journal of said proceedings said clerk omitted to state, and did not state, that the minutes were read and approved by the House; that the Speaker declared the House adjourned; that the House was adjourned by the acquiescence and assent of all the members, and that the Speaker *pro tem.* was elected after the said adjournment, and the subsequent pretended legislation had and done after such adjournment; that said chief clerk, Charles H. Reed, pretends and asserts that he has made up the journal of said last day's proceedings, has procured the signature of said Wheeler as Speaker *pro tem.*, and delivered the same to Edward J. Curtis, secretary of the territory, but the minutes of proceedings as prepared by said Reed omit the matter as hereinbefore alleged to be omitted, and is a false statement or record of the said proceedings; that the said secretary, Edward J. Curtis, treats and wrongfully holds out the minutes so signed by said Wheeler and the chief clerk as the true minutes, record and journal of the

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including that under the Speaker *pro tem.* and by him signed, and delivered them to Curtis, secretary of the territory, who received and receipted for them to said clerk. Speaker Burkhart petitions this court to issue a writ of mandate, directing Secretary Curtis to produce the record of the House to the court, that the court direct the record to be amended by the chief clerk to correspond to the facts and permit the said Speaker Burkhart to sign the same as Speaker. Held, that *mandamus* will not lie to inquire into the acts of a legislative body by verbal testimony, and cause its record to be corrected, or if there be no record to make one; and that a legislative journal can only be corrected by the body that made it.

Arthur Brown, Lyttleton Price, Texas Angel, and S. B. Kingsbury, for Petitioner.

R. Z. Johnson and Albert Hagan, for Respondent Reed.

James H. Hawley and John S. Gray, for Respondent Curtis.

WEIR, C. J.—This is an application by the plaintiff for a writ of mandate to be directed to the defendants above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which is as follows: "The above-named plaintiff, H. Z. Burkhart, shows that he was the duly elected Speaker, and is now the actual and acting Speaker, of the House of Representatives of Idaho; that defendant, Charles H. Reed, is chief clerk of the House of Representatives, and Edward J. Curtis is the secretary of the territory of Idaho; and for cause of action for *mandamus* alleges that the said defendant, Charles H. Reed, has in his possession, as such chief clerk, the minutes of the proceedings of said House of Representatives for the last day of the fifteenth session; that the same has not yet been signed by plaintiff, H. Z. Burkhart, the Speaker, and said defendant Reed refuses to present the same to said Speaker for his signature, but that said defendant Reed, in preparing a record of said minutes, omitted a part of the said proceedings; that in truth, on the sixtieth day of the said session, February 7, 1889, just before 12 o'clock P. M., the said Speaker inquired if there was any further business; that the clerk replied there was none; said Speaker then requested the journal

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was the duly elected Speaker, and is now the actual and acting Speaker, of the House of Representatives of Idaho; that the defendant, Charles H. Reed, is chief clerk of the House of Representatives, and Edward J. Curtis is the secretary of the territory of Idaho; that Charles H. Reed has in his possession, as such chief clerk, the minutes of the proceedings of the said House of Representatives for the last day of the fifteenth session; that he refuses to present the same to the plaintiff for his signature, and has prepared a record of said minutes, omitting a part of the said proceedings. The petition then proceeds to set forth certain facts which it alleges took place in the House of Representatives, but that the defendant Reed has omitted such proceedings from the minutes; and proceeds to allege that the said chief clerk has made up a journal of said last day's proceedings, has procured the signature of one Wheeler, as Speaker *pro tem.*, and has delivered the same to Edward J. Curtis, secretary of the territory; that the minutes of proceedings, as prepared by said Reed, omit the matters alleged in the said petition to have been omitted, and is a false statement or record of the proceedings; that the secretary, Edward J. Curtis, wrongfully holds out the minutes so signed by Wheeler and the chief clerk as the true journal of the House of Representatives, and is recording the same as such journal, and threatens to certify them to Congress as the journal of the House of Representatives, although he knows that the said proceedings were not signed by the plaintiff. While it is true that a general demurrer admits the truth of facts as stated in the pleadings, yet it is equally true that facts not well pleaded, and mere conclusions of law, are not admitted by a demurrer. There is no pretense that the averments in this paragraph are mere conclusions of law, or that the facts are not well stated. The contention is that the facts stated, if established, would be immaterial and irrelevant, and would constitute no valid ground upon which this court could act. In plain language, the facts, if admitted true, would not constitute a cause of action. (Bliss on Code Pleading, sec. 418.) Moreover, "a public statute, of which we are bound, *ex-officio*, to take notice, as well as to the time it went into effect, as to its provisions, this allegation is not admitted, or to be taken to

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be true by the demurrer. The existence or the time of the taking effect of a public act cannot be put in issue, or admitted or denied by the pleadings, but must be determined by the judges themselves." (*Attorney General v. Foote*, 11 Wis. 16, 78 Am. Dec. 689.)

It seems to be well settled that the courts will take judicial notice of the journal of a legislative body to determine whether an act of the legislature is constitutionally passed, and for the purpose of ascertaining what was done by the legislature. A journal, according to the petition, has been filed with the secretary of the territory, and is therefore a public record, and such a record as this court is bound to take judicial notice of. There is, then, no need of stating what appears upon the journals of the legislature or what does not appear. Such matters are judicially noticed without averment. No issue of fact can be taken upon what a court is required, as a court, to know. These averments in the pleading, even if true, contain no issuable fact, and in such a case a demurrer is the proper remedy. The petition concedes that a journal has been filed by the clerk, upon the adjournment of the legislature, with the secretary of the territory, but alleges that the journal was not properly made up by him. Section 124 of the Revised Statutes of Idaho provides that "the clerks, at the close of each session of the legislature, must mark, label, and arrange all bills and papers belonging to the archives of their respective Houses, and deliver them, together with all the books of both Houses, to the secretary of the territory, who must certify to the reception of the same."

We have said that the petition concedes that a journal has been delivered to the secretary of the territory, and that the secretary of the territory treats such journal as the journal of the legislature. By section 190 of the Revised Statutes the secretary of the territory is charged with the custody of such journals. Section 1844 of the organic act provides that the secretary shall record and preserve all the laws and proceedings of the legislative assembly. We are now invited to direct the secretary to produce before this court the journal which was delivered to him by the clerk of the House of Representatives, in order that the plaintiff, a member of the

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legislature, may be allowed to make certain corrections therein, and that, after such corrections are made, the secretary receive the corrected journal as the journal of the legislature, delivered to him by the clerk thereof. The production of the journal would be a mere idle proceeding, unless for the purpose of allowing the court to pass upon the question of fact as to whether this book is or is not the journal of the legislature. The journal itself is a public record, and open for public inspection, and any citizen of the territory is entitled to inspect the same; so that its production can only be asked for in order to allow certain corrections to be made. Hence, if this court comes to the conclusion that it cannot allow such corrections to be made, then the production of the journal merely for inspection is wholly unnecessary.

There is no dispute that the law places no obligation upon Curtis, as secretary, other than that he must receive the journal from the clerks of the legislature and record the same. From the language of section 124 of the Revised Statutes it is clearly the duty of the clerk to make up such records as he deems proper to be delivered to the secretary, and deliver the same. This he has done, and that is the only duty imposed upon him by statute. The law presumes he has done this correctly, and, if not, he is amenable to the Criminal Code of this territory. The question whether the papers so delivered by the clerk to the secretary are correct or not is one which this court cannot entertain. The papers so delivered either are or are not the journal of the legislature. If they are, then this proceeding necessarily fails. If they are not, then it is not the province of this court, nor within the power of this court, to question them, or to make a journal for the legislature. That power is vested in the legislature alone, and is not a power conferred upon the courts.

It is contended with great zeal by the learned counsel for the relator that the journal so delivered is not the journal of the legislature; hence the relator has a right to correct it, so that in his judgment it may become the journal of the legislature, and, as so corrected, that the same be filed with the secretary. This position is wholly untenable. Certainly this court would not correct so important a document as the



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journal of a legislature, or what purports to be the journal of a legislature, upon the unsupported statement and recollection of one person only, without hearing evidence which might be offered by the defendant. That would necessarily involve the trial of an issue of fact—namely, is the journal so filed correct or incorrect—the trial of which issue might lead to the most absurd consequences, which we do not deem necessary to state. If the plaintiff desires the production of this public record as a mere matter of curiosity, then, of course, the court would refuse to grant the writ. His only object in demanding its production, therefore, can be but for one purpose only, and that is, that the court may correct it according to certain evidence which may be introduced. The principle of law is settled beyond controversy that a court will not go behind the journal of a legislature to ascertain what was done by that body. The journal itself is conclusive, and, if the journal is incorrect, or improperly made up, it is for the legislature itself to correct it, and not for the court. The journal, as filed, purports to be the journal of the legislature. It is signed by George P. Wheeler, Speaker *pro tem.* of the House, and would, therefore, seem to be correct on its face. The presumption always is that when an act of the legislature is signed and enrolled, that it has gone through all the necessary formalities. A few of the states hold that the enrolled statute is conclusive evidence of its due passage and validity. A great majority of the states, however, hold that this makes out a *prima facie* case only, and that such case may be overthrown by the journals, and that the judges, for the purpose of satisfying themselves, may take judicial notice of the journal, and, if that appear to be regular, that is final and conclusive upon the courts. (Cooley's Constitutional Limitations, 5th ed., 163, note 2; *Sherman v. Story*, 30 Cal. 253, 276, 89 Am. Dec. 93; *Territory v. Clayton*, 5 Utah, 598, 18 Pac. 628, 629; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 449; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738.)

We have been unable to find a single case which maintains the contrary of this document. Counsel, with great zeal, have searched for such authority, but have been unable to cite us to a single one. We have endeavored to find some authority

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for the position taken by counsel for the plaintiff, but have been unable to find any. The authorities cited by counsel, in which superior courts have compelled inferior courts to correct their records, are not at all in point, and are entirely different in principle. The superior courts have authority over inferior courts, and it is their duty to compel them to keep proper records. On the contrary, courts have no authority over the deliberations of a legislative body, and therefore cannot compel them to keep any record, or interfere with any record that they have kept. The case of *Territory v. Clayton*, *supra*, is in point here, and seems to have been well decided both upon authority and principle. In that case the court refused to go as far as we are disposed to go. There the court refused to look beyond the record contained in the office of the secretary of the territory, and refused to go to the journals of the legislature for information, and expressly held that it would not receive verbal testimony to support or contradict the record in the office of the secretary of the territory.

It is unnecessary for us to go into the reasons which have induced the various courts to unanimously proclaim the doctrine which we may have set forth. It would be a mere waste of time, because most of the authorities which we have cited contain the reasons of the courts for their action.

It is contended that there is some difference between a direct attack upon the action of a legislature and a collateral attack. It is sufficient to say that in every case which has been presented to our attention the attack upon the acts of the legislature has been collateral. We concede that this is the first case, so far as we are able to ascertain, in which the court has been invited by *mandamus* to inquire into the acts of a legislative body by verbal testimony, and to permit its record to be corrected, or, if there be no record, to make one; and we can safely say that this case is sanctioned by no precedent and sustained by no authority. "The supposed case of less than a majority of this court causing a judgment to be entered of record is not apropos, for, if it were done, the only remedy would be in this court, for the reason there is no other tribunal or department of the government that could afford one; and, by parity of reasoning, the only correction that can be

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made in a legislative journal is by the body that caused it to be made. The suggestion that fraud or bad motives in those who caused it to be made might defeat the remedy, would apply to the one case as well as to the other; but confidence must be reposed somewhere, and why not in a legislative body as to the keeping of its journals, as well as in this court as to the keeping of its records? Besides, the people is the final tribunal before whom, as a rule, such delinquencies must be settled (Cooley's Constitutional Limitations, 168); and, in the case of legislators, the return to the people being at comparatively short intervals of time, it is difficult to see how such abuses, if they exist, can be of very long standing, and in such cases it is 'better to bear the ills we have than flee to others we know not of.' " (*State v. Smith*, 44 Ohio St. 348, 7 N. E. 449.)

Some question has been raised by counsel for the plaintiff that this body was not the legislature. As the petition itself alleges that the plaintiff was the Speaker of the House, that the defendant Reed was chief clerk of the House, and that these journals, with certain exceptions, are the journals of the House, and that, as such journals, they have been delivered by the clerk to the secretary of the territory, and received by him and recorded as such, we cannot consider that point. For the reasons that we have stated the demurrer must be sustained, and the application for a writ denied, with costs.

Logan, J., concurs.

BERRY, J., Dissenting.—In this case I am constrained to dissent from the opinion of my associates, sustaining the demurrer in this proceeding, and I deem it necessary and proper that the grounds of such dissent be stated. The object of the proceeding is to secure the issuance of a writ of *mandamus* against certain public officers. I shall at first confine my attention to this case, and afterward refer to the similar case of *Clough v. Curtis*, post, p. 523, 22 Pac. 8. It is a familiar principle in law and practice that the allegations of a pleading demurred to shall, for the purposes of that proceeding, be taken as true. The allegations of this complaint are, therefore, to be taken as admitted. I copy the body of the complaint in

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this case, together with the demurrer, and make them a part of this dissenting opinion. The following is the complaint: "The above-named plaintiff, H. Z. Burkhart, shows that he was the duly elected Speaker, and is now the actual and acting Speaker of the House of Representatives of Idaho; that defendant, Charles H. Reed, is chief clerk of the House of Representatives, and Edward J. Curtis is the secretary of the territory of Idaho, and for cause of action for *mandamus* alleges that the said Charles H. Reed has in his possession, as such chief clerk, the minutes of proceedings of said House of Representatives for the last day of the fifteenth session; that the same have not been signed by plaintiff, H. Z. Burkhart, the Speaker, and the defendant Reed refuses to present the same to said Speaker for his signature; but that said defendant Reed, in preparing a record of said minutes, omitted a part of the said proceedings; that in truth, on the sixtieth day of said session, February 7, 1889, just before 12 o'clock P. M., the said Speaker inquired if there was any further business; that the clerk replied that there was none; said Speaker then requested the journal to be read, which was done by the clerk; that thereupon the proceedings, as recorded in said journal, were approved by the House of Representatives, and by said Speaker declared to be approved; that thereupon, the hour of 12 o'clock, midnight, having arrived and passed, the Speaker did, after said hour, declare and announce that, the time having arrived when, by act of Congress, the session of the legislature must close, therefore he, as Speaker, thereby then and there declared said session closed and adjourned without day; that no objection was made by the House, or any member thereof, to the said adjournment, or to the authority of the said Speaker to declare the same adjourned, but all acquiesced therein; that after the Speaker and part of the members had retired from the room, a portion of the members pretended to elect a Speaker *pro tem.*, to wit, one George P. Wheeler, and assumed, and pretended to proceed with the pretended legislation; that a large number of assumed and pretended bills were assumed to be passed by the said remaining members, and pretended to become the acts of the legislature; that all pretended proceedings on said last day, after the Speaker re-

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tired, were after 12 o'clock, midnight, and after said House had been aljourned; that, in preparing the journal of said proceedings, said clerk omitted to state, and did not state, that the minutes were read and approved by the House; that the Speaker declared the House adjourned; that the House was adjourned by the acquiescence and assent of all the members; and that the Speaker *pro tem.* was elected after the said adjournment, and the subsequent pretended legislation had and done was after such adjournment; that said chief clerk, Charles H. Reed, pretends and asserts that he has made up the journal of said last day's proceedings, has secured the signature of said Wheeler as Speaker *pro tem.*, and delivered the same to Edward J. Curtis, secretary of the territory; but the minutes of proceedings, as prepared by said Reed, omit the matter as hereinbefore alleged to be omitted, and are a false statement or record of said proceedings; that the said secretary, Edward J. Curtis, treats and wrongfully holds out the minutes so signed by said Wheeler and the chief clerk as the true minutes, record, and journal of the House of Representatives, and is recording the same as such journal, and threatens to certify them to Congress as the journal of said House of Representatives; that he knew that said proceedings of the last day were not signed by the Speaker; that plaintiff, by his attorney, Lyttleton Price, has filed, to wit, on the ninth day of February, 1889, and before the same were recorded with said secretary, Edward J. Curtis, a demand in writing that he do not record said proceedings, and a protest against the same, on the ground that they were not the correct record of the proceedings of the House of Representatives; that the plaintiff did, on the eighth day of February, 1889, demand of the defendant, Charles H. Reed, that he present said minutes of proceedings to the plaintiff for signature; that he failed and refused, and still fails and refuses, to so produce the same; that the rules and practice of said House of Representatives require that the said defendant Reed present all the minutes of proceedings thereof to the plaintiff, as such Speaker, for his signature. Wherefore plaintiff prays that said Edward J. Curtis may produce in court the original minutes, record or proceedings delivered by said Reed to said Curtis, and that said defendant,

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Charles H. Reed, be required to prepare said journal according to the facts as hereinbefore set forth, and state that said minutes were read and approved; that, after the hour of 12 o'clock, midnight, of February 7, 1889, the Speaker declared said House adjourned *sine die*; that the House did not object to said adjournment, but acquiesced therein, and in all of the other proceedings hereinbefore stated; and that such journal be handed to the Speaker to sign, and thereafter, when so amended and completed, to be delivered to said secretary of the territory as the minutes of the proceedings of said last day, or that said defendant show cause forthwith why said defendants should not do so." This complaint was verified.

## DEMURRER.

"Now comes the defendant, Charles H. Reed, and demurs to the alternative writ of mandate herein filed, on the grounds that it appears on the face thereof (1) that this honorable court has no jurisdiction of the subject of this proceeding; (2) that the court has no jurisdiction of the person of the defendant in this proceeding; (3) that said H. Z. Burkhart has not legal capacity to sue in this proceeding; (4) that there is a misjoinder of parties defendant in that said alternative writ joins this defendant and Edward J. Curtis, the secretary of the territory and an officer of the United States, as defendants; (5) that several causes of action have been improperly united, in that relief is demanded against this defendant, on the ground that this defendant has in his possession certain proceedings of the House of Representatives of the territory, and another alleged and distinct cause of action is stated against Edward J. Curtis, the secretary of the territory, on the ground that said Edward J. Curtis, as such secretary, has possession of said proceedings; (6) that the same does not state facts sufficient to constitute a cause of action, or to entitle said plaintiff to relief by writ of *mandamus* against this defendant; (7) that the same is ambiguous, unintelligible and uncertain in this: that it is first averred therein, as a ground of relief against this defendant, that this defendant has in his possession the minutes of the proceedings sought to be reached herein, as a ground of relief against the said de-

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fendant, Edward J. Curtis, secretary of the territory; that this defendant has filed said minutes with said secretary, as this defendant is required by law to do; and that said secretary retains and preserves the same, as he is required by law to do."

Not having had an opportunity until the present moment to see or know the tenor or effects of the points made in the opinion of my associates upon the bench, beyond the bare fact that the demurrer was to be sustained, the scope of my observations may be, perhaps, beyond the required limits, made necessary by the opinion dissented from. But I will follow in some degree the order of the argument of the leading counsel in support of the demurrer.

1. There is, I think, no room for a serious question that this court has full and complete power to issue the writ as prayed; also, that it has jurisdiction of the subject matter of the complaint. The power to issue writs of *mandamus* must be vested somewhere, and the legislature, in plain and unequivocal terms has conferred it upon this court. It seems to me too plain to admit of any doubt. Section 1866 of the Revised Statutes of the United States says: "The jurisdiction, both appellate and original, of the courts provided for in sections 1907 and 1908 shall be as limited by law"; and in section 1907: "The judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Montana, and Wyoming shall be vested in a supreme court, district courts, and probate courts, and in justices of the peace." Revised Statutes of Idaho, sections 3815, 3816, title 2, entitled "Of the Supreme Court," are as follows, viz.: "The jurisdiction of this court is of two kinds: 1. Original; and 2. Appellate." Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction. Section 3817 defines its appellate jurisdiction.

2. So of the jurisdiction of the court over the persons of both defendants. It makes no difference that one of them, the secretary of the territory, is appointed by the President of the United States. He is not, therefore, the executive branch of the United States government, nor even of the territory of Idaho. Congress has declared, in the organic act of the terri-

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tory, that the executive power of the territorial government is vested in the governor alone. The secretary is no more above the laws than the marshal, the United States district attorney, or the deputies of either of these officers, or the most humble person in the land. (*Kendall v. United States*, 12 Pet. 608; *United States v. Schurz*, 102 U. S. 372.) The authorities are numerous and clear that even cabinet officers are equally subject to the mandate of courts with any other person; but it is not necessary to cite those authorities. The one principally relied on by the defendants is that of *Marbury v. Madison*, 1 Cranch, 137. But that case was decided on other grounds than the official character of the party defendant. Congress supplied the defect found in the law in that case by conferring the needed power to issue the writ on the courts of the District of Columbia. Since then cabinet officers have constantly been held subject to the jurisdiction of courts with no more power than has this court. If the court can issue a writ at all—of which there is no doubt—no case can reasonably be supposed, unless it be the case of *Clough v. Curtis*, post, p. 523, 23 Pac. 8, now pending in this court, involving a part of this controversy, calling for the exercise of this power more emphatically than do the admitted facts in the case at bar. If cabinet officers are thus within the jurisdiction of the court, there is certainly no ground for an inferior officer of a territory to claim greater immunity, simply because he is appointed by the President. They, also, are appointed by the President, and stand nearer to him than any officer of the territory. The counsel for the secretary practically admits this by saying that a state court cannot issue a writ of *mandamus* to an officer commissioned by the United States, except as they are authorized by the United States. I think the counsel is mistaken in this, and that he will find that, while the rule as to state courts is not universal, it applies only where the officer's duties are purely federal, as in the case of a United States land officer; but not in such a case as this, where the officer is not in the service of the United States, but only an inferior officer of the territory acting in and for the territory. But even if it were otherwise, this court has federal jurisdiction, as well as territorial. I suppose that fact will not be disputed. I can see nothing valid in the objec-



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tion that a territorial officer is not amenable to the laws because he is commissioned by the President of the United States.

3. The plaintiff has an unquestionable power to sue. He was, and still is, the Speaker of the House, and as such, had, and still has, the exclusive right to the performance of the duties set forth in the complaint. The public requires it of him, even if no executive or administrative officer can be found willing to assist him to his own and the public right. If that right is invaded, as by the defendants' demurrer it is admitted to be in this case, he may invoke the aid of this tribunal to enable him to perform his sworn duties to the public. Any member of that legislative body may interpose to preserve the lawful records of its proceedings, and prevent the dearest rights of the community, the very foundation of its laws—the evidence upon which the interests of thousands depend—from being, in a wholesale manner, falsified and debauched. It was shown on the argument that in a matter vital to the public any citizen may institute proceedings by *mandamus*. (High on Extraordinary Remedies, secs. 431-433; *Railroad Co. v. Hall*, 91 U. S. 354; *Hall v. Railroad Co.*, 3 Dill. 521, Fed. Cas. No. 5950.) In *Railroad Co. v. Hall*, *supra*, the supreme court of the United States held that *mandamus* was correctly brought by a citizen of Council Bluffs to compel the Union Pacific Railway Company to fulfill its contract with the United States to build a bridge across the Missouri river. This case meets the objection raised by the demurrer on this point, without at all referring to the official character and rights of this plaintiff. The contract with the United States on the part of the Union Pacific Railway Company was one to enforce which the attorney general would have been a proper officer to sue out the writ, and might have done it; but, as he did not do it, the court held that any other citizen might do so.

4. It is also contended that there is a misjoinder of defendants. No; there is no misjoinder if the facts are as stated in the complaint, and the demurrer admits them. What papers the secretary has are admitted to be unsigned, mutilated, and fraudulent papers, and are not "archives of the legislature," which alone the secretary has a right to receive, any more than would be the records of a baseball club, or any other

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unlegislative association or gathering. Of this he was, and is, duly apprised. If what is admitted to be true are real facts, the secretary is aiding and abetting the clerk in his attempt to foist upon the territory as records what are not records, to be used, if at all, as conclusive evidence to establish as facts what are not facts, and that legislative acts were done which it is admitted were never done by a legislature. The joining by these two officers in the perpetration of a grave wrong, one doing one part and the other completing it, makes them both *particeps*, and subject to the same process, if necessary, for its correction and prevention. In this case it is necessary. The secretary must produce the fraudulent papers, abstain from treating them as genuine, or, as he threatens to do, from recording them and sending them to Congress, and the several officers of the United States government, as genuine, or in any way to act upon them, until the clerk shall write them truthfully, and they shall have the necessary official sanction of the chief officer of the House, whose proceedings they profess to record, and until they thereby become real records and archives of the legislature. There is no misjoinder.

5. Proceeding in the order of the attorney for the secretary, we may here inquire whether the session of the legislature did, in fact, expire with the seventh day of February, 1889. The inquiry is not necessary, perhaps, for the fact is admitted. But let us look into the facts and the law. It met on the tenth day of December, 1888. That was its first legislative day, and so appears on its journals. The session began with the beginning of that day. The claim that it did not begin till noon of that day, and hence that the first day should end at noon of the next day, and so for each day through its session, to the sixty-first day, simply because the territorial legislature had enacted that the legislature should meet at noon of the day appointed for the meeting, cannot for a moment be maintained. If such a thing could be, there would be no meridian to the legislative day. It met at 12 o'clock M.: that day's noon would be midnight. The law takes no notice of fractions of a day. Congress has said how long the session should continue, and it was not competent for the territorial legislature to prolong the time. This act of Congress is in the following words, and

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has all the force of a constitutional provision: Revised Statutes of the United States, section 1852, says: "The sessions of the legislative assemblies of the several territories shall be limited to sixty days' duration." The act of the legislature fixing the hour recognizes the second Monday of December as the first day of the session. The section (Idaho Rev. Stats.) is as follows: Section 122. "At the hour of 12 o'clock M., on the day appointed for the meeting of any regular session of the legislature, the presiding officer, or, in his absence, the chief clerk of each House of the last session, must call the same to order, and preside until a presiding officer is chosen, or, in case of the absence of both of said officers, the senior member present must perform said duties. All members-elect present, having certificates of election from the clerk of the board of county commissioners of their respective counties, and no other person, has the right to participate in the organization of the respective Houses. Neither House must organize or transact business, but must adjourn from day to day until a majority of all the members authorized by law to be elected are present." It does not pretend to extend the time fixed by Congress, but merely fixes the hour of meeting, and declares it shall meet at noon of that day. There is nothing whatever in the statute, or either of them, or in the construction given them by either branch of the legislature in the numbering the days of the session, to justify this extraordinary claim. Both bodies counted in their journals the tenth day of December as one day of the session, and numbered from it. Even the bodies which met, as is alleged, on the eighth day of February, admit the hollowness of this pretense, by claiming its acts to have been done on the 7th of February instead of on the day on which it is admitted they were in fact done. They themselves seek to take shelter under a false date. Were there anything in this claim, no reason is apparent why acts done before noon of the 8th should be antedated a day to bring them within the law.

6. It was clearly the duty of the presiding officers of both Houses to obey the law; and, when the constitutional time had expired, to declare the session ended. Such action is abundantly sustained by both authority and precedent. In this case the acts of both presiding officers were acceded to by both

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Houses. What occurred in the House also occurred in the council. When the minutes of the last day had been read, and formally approved in the House by the members in session, and the clerk had publicly announced that there was no more business before the House, and the Speaker, at 1 o'clock in the forenoon of the 8th of February, declared to the listening House that the hour fixed by Congress for adjournment had arrived and passed, and that, in view of such fact, he, as presiding officer, declared that session ended, and there was no objection or appeal from this decision, that session was ended. Three things concur to give force and effect to the solemnity of his act: 1. The expiration of the time fixed by Congress; 2. The official action of the presiding officer; and 3. The assent and concurrence of the entire body. Whether, under such conditions, the House broke up, as is conceded it did, or all members remained in their places, is of no moment. The regular session was ended; and if, before the meeting of the next legislature, that body could reconvene, it must be in extra session, called pursuant to law. After that moment, whatever was done by certain members was not done by a legislative body, and all its acts pretending to be legislative acts are, in fact, absolutely null and void.

7. It follows from the facts that this so-called legislature was not a legislature, and those so-called records are not, in any sense, legislative records; that the arguments and authorities upon the power of the court to correct or supervise acts done by a real legislature, or the effect, for any purpose, of real legislative records, or whether such real records can or cannot be impeached collaterally, and any and all questions, and, I think, either in the majority of opinions of this court, or otherwise, based on a presumption founded on real records, are wholly irrelevant, and do not bear on this case. These questions comprise most of the arguments of these demurrants, and have no bearing on the case before this court. They are collateral merely. Those papers are not called in question collaterally, but directly, by proceedings provided by law to determine whether they are, in fact, records of a legislative body or not; and, if not records, then to have them, or such of them as are not records, so declared, and to have the spurious por-

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Points decided.

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tions expunged, and the true records substituted. This is a plain and simple duty of the court, for which it was created and armed with plenary power.

8. These considerations apply as well to the case of *Clough v. Curtis, supra*, as to this case. The facts in the two cases are, in the main, the same, only that like proceedings took place in the council as in the House, and except that in that case a fact is also alleged and admitted by the demurrer: that the true record was mutilated; that three leaves of the genuine records, which had actually been written up and approved before adjournment, were removed from the records, and their places supplied with matter falsely purporting to be a record of proceedings by the legislature before it had expired. The high-handed character of those acts should be investigated, and should not be hidden. If those grave charges be not in fact true, let them be denied, and let both sides be admitted to their proof. The demurrer in both cases should be overruled.

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(March 11, 1889.)

CLOUGH, PRESIDENT OF COUNCIL, v. CURTIS, SECRETARY  
OF TERRITORY.

[22 Pac. 8.]

**APPLICATION FOR WRIT OF MANDATE.**—The secretary of the territory must receive from the clerks of both branches of the legislature, at the close of each session, all bills and papers belonging to the archives of the respective Houses, and all books of both Houses, and certify to the reception of the same. He is not required nor permitted to receive any documents from any other source. It is not within the scope of *mandamus* to confer power upon those to whom it is directed. It only enforces the exercise of powers already existing, when its exercise is a duty.

Arthur Brown, Lyttleton Price, Texas Angel, and S. B Kingsbury, for the Petitioner.

James H. Hawley and John S. Gray, for Respondent.

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WEIR, C. J.—This is an application by the plaintiff for a writ of mandate to be directed to the defendant above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which reads as follows: "Your applicant respectfully shows to your honorable court that he is the president of the council of the fifteenth session of the legislature of Idaho territory. That he was duly elected, qualified, and acted as, and is the acting, president of that body. That the defendant, Edward J. Curtis, is the secretary of the territory of Idaho. That, on the sixtieth day of the said session of the legislature, February 7, 1889, the following proceedings were had in the council: That the said council continued in session during the whole of the said sixtieth day till 12 o'clock, midnight, of that day, and thereafter till about 1 o'clock of the next succeeding morning. That at that time a communication was received by the said council from the chief clerk of the House of Representatives of the said fifteenth session, announcing that the said House of Representatives had then and there elected one George P. Wheeler a Speaker *pro tem.* of the said House of Representatives. That this communication was received long after the sixtieth day had expired, to wit, about 1 o'clock of the 8th day of February, 1889. That your applicant, the president of the council, then and there declined to receive the said message as a message from the House, for the reason that the said House of Representatives had no authority to elect a Speaker after the sixty days prescribed by the limitation of the act of Congress had expired. That thereupon this applicant, as president of said council, did then and there announce to the council and declare 'that, because the hour of 12 o'clock and after had arrived, and the time had elapsed in which the said legislature was permitted to transact business, therefore the said council was adjourned without day,' and your applicant alleges that the said fifteenth session of the council of the legislature of Idaho territory was then and there adjourned and terminated. That your applicant then inquired of the chief clerk, Edward L. Curtis, if the said adjournment was recorded in the minutes of the proceedings of the said session, and received the reply from him that it was. Your applicant further

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shows that the said council then dispersed, and he himself, and other members of the council, left the room, and your applicant is informed, and alleges on information and belief, that, after the said president of the council and other members of the council had left the room, other members assumed and pretended to reorganize the said council, and assumed and pretended to elect one S. F. Taylor president *pro tem.* of said council, and to elect other officers of the council, and assumed and pretended to transact legislative business thereafter, and assumed and pretended to pass enactments which the said persons, pretending to be a legislature, did then and there assert and claim were acts of the legislature of the fifteenth session of Idaho territory. That, as your applicant is informed, and on his information and belief charges, there are some seventeen of said pretended acts of the legislature thus assumed and pretended to be passed by the said persons after the time had expired for holding said session of the legislature. Your applicant further alleges that, in making up and preparing a record of the said sixtieth day of the said session of the legislature, the clerk did not show thereafter the same to this applicant, and your applicant has never seen, till after the said chief clerk had filed with the secretary of the territory, the defendant herein, certain papers which he claimed and pretended were the proceedings of the said sixtieth day of the said session of the council, but which, in truth and in fact, were a false and fictitious account of the proceedings of that day, signed by S. F. Taylor, and not signed by J. P. Clough, president of the council, as required by the rules and practice of the council. That your applicant has now seen the said pretended proceedings in the office of the secretary of the territory, and finds that a part of the said pretended minutes or records has been cut out. That there are three stubs of leaves which have been part of the former proceedings of the records or minutes of the said fifteenth session. That that part of the minutes which recites that the said president of the council had declared the said session adjourned, and his reasons therefor, has been cut out, and was omitted from the minutes as filed with said secretary of the territory. That this applicant, the president of the said council, did, on the fourteenth day

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necessarily involves an inquiry into the powers and duties of the defendant secretary, conferred upon him by law. Section 124 of the Revised Statutes of Idaho prescribes the duties of the chief clerk of the legislative council, and the duties of the defendant, as secretary of the territory, in reference to the journals and rolls of that body, in these words: "The clerks, at the close of each session of the legislature, must mark, label, and arrange all bills and papers belonging to the archives of their respective Houses, and deliver them, together with all the books of both Houses, to the secretary of the territory, who must certify to the reception of the same." Section 1844 of the organic act imposes further duties upon the secretary of the territory, and prescribes and defines those duties as follows: "The secretary shall record and preserve all the laws and proceedings of the legislative assembly, and all the acts and proceedings of the governor in the executive department. He shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session thereof, to the President, and two copies of the laws, within like time, to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress. He shall transmit one copy of the executive proceedings and official correspondence semi-annually, on the first day of January and July in each year, to the President. He shall prepare the acts passed by the legislative assembly for publication, and furnish a copy thereof to the public printer of the territory, within ten days after the passage of each act." And afterward, by act of Congress of June 20, 1874, further duties were imposed upon him, which are as follows: "And hereafter it shall be the duty of the secretary of each territory to furnish estimates in detail for the lawful expenses thereof, to be presented to the secretary of the treasury on or before the first day of October of every year." The duties of the defendant secretary are very clearly defined by these statutes. They constitute the chart of his authority. He is bound to perform the duties thus imposed upon him, but nothing more. He must receive from the clerks of both branches of the legislature, at the close of each session, all bills and papers belonging to the archives of the respective Houses, together with all the books of both Houses,



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and must also certify to the reception of the same. He is not required, nor, in fact, permitted, to receive and record any such documents from any other source. Clearly, it was not his duty to receive from the plaintiff his alleged report of the proceedings, as he claimed them to be, or to incorporate the same in the proceedings of the said legislature, or to record the same as a part of the proceedings, or to certify the same to Congress. It is equally clear that it was not the duty of the secretary, upon the plaintiff's demand, to expunge from the journal and minutes of the sixtieth day of said session the proceedings assumed to be had before S. F. Taylor as president of the council, or to strike from the files and records the alleged pretended acts of the legislature, which were passed while the said S. F. Taylor was acting as president *pro tem.* of the council. Not only was he not authorized to do what was demanded of him, but, if he had done so, it would have been a clear breach of his official duty. The law authorized him to receive such reports from one source only, and he could not receive them from any other. The president of the council had no more right to make this demand upon the secretary than would any other member of the legislature; and certainly, upon the unsupported word of one member of the legislature only, the secretary would not be authorized to change, modify, or expunge from the journal, which he had received from the proper source, anything therein contained. Neither had he the right to assume judicial functions, and decide upon evidence what should constitute the proceedings of the legislature.

It is not within the scope of *mandamus* to confer power upon those to whom it is directed. It only enforces the exercise of powers already existing, when its exercise is a duty. (*United States v. County of Clark*, 95 U. S. 769.) The court there say: "A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty." In the case of *Supervisors v. United States*, 18 Wall. 77, Mr. Justice Strong, in delivering the opinion of the court, says: "It is very plain that a *mandamus* will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the law of the state from which they derive their powers. Such officers

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are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. And it may be observed that the office of a writ of *mandamus* is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked." And again, in the case of *United States v. County of Macon*, 99 U. S. 591, the court say: "We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation." We might cite a multitude of authorities which sustain this doctrine, but the principle is so well established that we deem it unnecessary. Certainly, considering this as the well-established law, we cannot create in the secretary of the territory a power to determine from evidence what are the correct minutes of the legislature. No such power is conferred upon him by statute, nor is there any such duty imposed upon him. As we have already stated, he is required to receive such journals as are handed to him by the clerks, and, after receiving them, to perform certain duties in regard thereto such as we have stated. There his power and his duty ends. To dispose of this case it is only necessary to refer to the prayer of the petition, which "prays that a writ of *mandamus* may issue from this honorable court, commanding the said Edward J. Curtis, secretary of Idaho territory, to record the said report of your petitioner as a part of the proceedings of said fifteenth session of the council of the territory of Idaho, and commanding him to expunge from the records and minutes of the sixtieth day of said session all the pretended proceedings assumed to be done by S. F. Taylor as president of the council, and to strike from the files and record of the laws of Idaho those pretended acts of the legislature which were passed while the said S. F. Taylor pretended to be president *pro tem.* of the council, and signed by him as such, and for such other relief as may be proper under the circumstances."

For these reasons, and also for those stated in the case of *Burkhart v. Reed*, ante, p. 503, 22 Pac. 1 (decided at this

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Argument for Appellant.

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term of the court), the demurrer is sustained, and the application for a writ of peremptory *mandamus* is denied, with costs.

Berry, J., dissents.

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(March 11, 1889.)

PEOPLE EX REL. GORMAN v. HAVIRD.

[25 Pac. 294.]

**ACTION TO TRY TITLE TO OFFICE—LEGAL, NOT EQUITABLE.**—An action under act of January 30, 1885, to try title to an office, to which there are several claimants is one of legal and not of equitable cognizance. The issues in such action or proceeding are legal ones, and the trial of such issues by a jury is a constitutional right of the party.

**ACT UNCONSTITUTIONAL.**—That part of section 536 of said act providing that actions of this nature "shall be tried by the judge of the district court at chambers," and without the intervention of a jury," held, to be unconstitutional and void.

(Syllabus by the court.)

**APPEAL** from District Court, Boise County.

George Ainslie, for Appellant.

Appellant insists, however, that "the provision of the federal constitution which secures to every party, where the value in controversy exceeds twenty dollars, the right of trial by jury does not apply to trials in the state courts," and by parity of reasoning to trials in the territorial courts which are not United States courts. (*Edwards v. Elliott*, 21 Wall. 532-558, and authorities cited; *Pearson v. Yemdall*, 95 U. S. 294-296; *Homebuckle v. Toombs*, 18 Wall. 648, 657; *American Ins. Co. v. Canter*, 1 Pet. 511; *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102.) In a case of information in nature of *quo warranto*, even a jury to try disputed questions of fact cannot be demanded as a matter of right. (*State ex rel. Norton v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253, and authorities cited; High on Extraordinary Legal Remedies, secs. 603, 617, 637, 743.) In Illinois the statutory proceeding is held to be to all intents

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and purposes a chancery proceeding. (*Dale v. Irwin*, 78 Ill. 170; *Dickey v. Reed*, 78 Ill. 262-270; *State v. Smith*, 26 Ohio St. 216; McCrary on Elections, 2d ed., 254, 285.) The mode of contesting an election being provided by statute is a special proceeding, and there can be no jury in such proceeding unless it is provided in the statute. (*Dorsey v. Barry*, 24 Cal. 449, 452-454.)

Huston & Gray, for Respondent.

We raise the question *in limine* here, as we did in the court below, that said court had no jurisdiction to hear, try and determine said action at chambers. Such power is attempted to be conferred by the act of the Thirteenth Session, but we submit, that said act is in conflict with the provisions of article 7 of the amendments to the federal constitution in this, that it deprives the parties of the right of trial by jury in a suit at common law, where the value in controversy exceeds twenty dollars. (Laws, 13th. Sess., p. 77; 3 Blackstone' Commentaries, 263; *Territory v. Lockwood*, 3 Wall. 236; 5 Bacon's Abridgment, 174; *Parsons v. Bedford*, 3 Pet. 433; *Webster v. Reid*, 11 How. 437.) If a new trial can be granted in this case upon the showing made, the litigation herein will perforce be interminable, for just so often as either party can, or thinks he can, show an illegal vote upon the other side, the case must be opened for a new trial. (*O'Leary v. Reed*, 30 Kan. 749, 2 Pac. 114; *Briswalter v. Palomares*, 66 Cal. 259, 5 Pac. 226, *Reed v. Drais*, 67 Cal. 491, 8 Pac. 20; *Bailey v. Landingham*, 52 Iowa, 415, 3 N. W. 460; *Hickenbottom v. Chicago etc. Ry. Co.*, 57 Iowa, 704, 11 N. W. 652; *Morrow v. Chicago etc. Ry. Co.*, 61 Iowa, 487, 16 N. W. 572; *Schreckengast v. Ealy*, 16 Neb. 510, 20 N. W. 853; *Steinbach v. Columbia Ins. Co.*, 2 Caines, 129.)

BERRY, J.—This action is under an act of the territorial legislature of Idaho, passed January 30, 1885, being sections 534-542, inclusive, of the Code of Civil Procedure, and its purpose is to try the title of the respondent to the office of sheriff of Boise county. It has the usual provisions for obtaining jurisdiction of the parties, the formation of issues by pleading,

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the trial of the issues, and the rendition of judgment, with the further privilege of appeal to this court. The proceeding is called by the act an "action," and it is so treated by both parties, and it must be so considered for the purposes of this appeal. Its purpose, however, is to attain the end reached by a writ of *quo warranto* at common law, or a writ of right for the king, against him who improperly claimed or usurped an office. Such a writ is not suited to our form of government, and in America it has fallen into disuse, and statutory proceedings in the nature of a writ of *quo warranto* have, in most of the states, if not all, taken its place. Those statutes vary in the extent of the remedy which they furnish; some, as in Alabama (Ala. Stats., Feb. 3, 1840, sec. 4), make of the court a mere inquisition to ascertain the regularity of the election. These have been held not to confer judicial power upon the court, as in a suit at common law; hence, that exercise of the right to hear and decide is rather in the character of supervisor of elections, and does not require the intervention of a jury. In other states this statutory proceeding has approximated more nearly in its scope to the writ of *quo warranto*; still retaining the criminal form of that writ, but using it as a civil remedy only. In our own territory our legislature has gone much further, and includes within its act the full scope of an information in the nature of a writ of *quo warranto*, including its criminal features and power to punish. Such information in the nature of a writ of *quo warranto* was properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize the office for the crown. (Paine on Elections, 710.) This law not only provides for supervision of elections and the correction of errors, but it goes further, and places in the court unmistakable judicial powers. Section 541 provides "that when a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding, any office, franchise, or privilege, judgment must be rendered that the defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court or the judge may also, in its or his discretion, impose upon the defendant a fine not exceeding \$2,000 dollars." Here are questions not merely

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as to regularity of an election, but also as to personal guilt or innocence, followed by pecuniary consequences of no small moment. It aims not only at a civil remedy, but also at a criminal trial, personal punishment, and pecuniary fine and loss. The act of willful intrusion into a public office, to which one has not been elected, is declared to be a misdemeanor. (Idaho Rev. Stats., sec. 6388.)

The section of the act in question, under which the district judge, at chambers, assumed jurisdiction, and tried this case, is section 536 of the act 1885, providing, among other things: "And such action shall be heard and determined by the judge of the district court at chambers and without the intervention of a jury, after due service of the summons, and the expiration of time allowed by law for answering the complaint in a civil action; but no judgment shall be rendered in such action by default." This is an essential provision of the act, and without which the other provisions are inoperative. If this is unconstitutional, as the respondent claims, the remedy under the act fails. This objection was taken by the respondent before the answer was filed. His exceptions to the ruling were then and there settled by the judge, and are incorporated as a part of the statement of the case on appeal. The respondent still stands upon such objection and exceptions in this court. It is true that the court, upon the hearing, found for the defendant, and that the defendant does not appeal. Yet it is not easy to see, if the objection was valid when it was taken, how his failure to appeal from a finding in his favor, where he has all along, and on the appeal, insisted on his objection, should be construed as a waiver of his exception. If, indeed, in any case, it might be so waived, it cannot be so in this case; for the objection goes to the jurisdiction of the court, to the validity of the statute, and not merely to an irregularity. That is not subject to such waiver. If that part of the act is void, the objection may be made at any time, even on appeal. The grounds on which it is urged that this provision is unconstitutional are (1) that it denies the right of trial by jury; (2) that it creates a tribunal unknown and unauthorized by the laws. Section 1868 of the Revised Statutes of the United States, as amended April 7, 1874, prescribing and limiting the powers of territorial

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legislatures, provides that "no party shall be deprived of the right of trial by jury in cases cognizable by the common law." Again (U. S. Const., art 3, sec. 2), "the trial of all crimes, except in cases of impeachment, shall be by jury." Again (U. S. Const., art. 5, Amend.), "no person shall be deprived of life, liberty, or property without due process of law." And again (U. S. Const., Amend. 7), "in suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." There seems to have been a disposition in some states, under their own constitutions, to evade these provisions, whether of the United States or state constitutions, or such of them as clearly affect this case. Some courts have gone so far as to deny squarely that proceedings of this nature are of legal, instead of equitable, cognizance. A Missouri case (*State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253), so holds. But this case is met by the New York court of appeals in *People v. Railroad Co.*, 57 N. Y. 161, in which case the court holds that an action in the nature of a *quo warranto*, brought by the attorney general, in the name of the people of the state, to try the title to a corporate office, to which there are several claimants, is one of legal and not equitable cognizance; that the issues therein are strictly legal ones; and that the trial of such by a jury is the constitutional right of the parties. The constitutional guaranty of the right of trial by jury in that state goes no further than the provisions of the federal constitution and the act of Congress cited, section 1868, as amended, and made especially to apply to our territorial legislature. Nor can the territorial legislature pass any law in contravention of the constitution or the laws of the United States. (U. S. Rev. Stats., 1851.) In other cases, as in the state of Illinois, the statute itself only confers a supervisory power over the regularity of the election, and does not at all apply to much of the ground covered by the statute of Idaho. A Louisiana court, in *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102, holds that the federal constitution in that respect can have no application to the state courts. Perhaps, as Louisiana is a sovereign state, that claim may be sustained. Other cases cited by the appellant hold the same. But we are not called upon to discuss that question. Idaho is not a state, but is a territory of the

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United States, and in all things subject to the constitution of the United States and the laws of Congress. Section 1868 of the United States Revised Statutes, as amended, seems to meet this case, and is conclusive. Even were this otherwise, and the question arose under the common law, which is adopted in this territory (Rev. Stats., sec. 18), the weight of authority is in favor of the construction given by the New York court of appeals in the case in that state above cited, but arising under the state constitution. (See, also, *Reynolds v. State*, 61 Ind. 392; *People v. Van Slyck*, 4 Cow. 297; *People v. Ferguson*, 8 Cow. 103.) But it is contended by the appellant that, if the issues here are triable by jury, and the objection was or is properly taken, and for that reason the judgment should be reversed, still a new trial should be granted. The answer to this may be that the proceedings in the court below were under the act in question, and, if wrong, it is because that part of the act on which they are based is invalid, and no valid judgment could be had; that, while the action in its present form cannot proceed, amendment changing its nature and purpose is not authorized by law. We are not called on to decide that point. There is no intimation of a purpose to amend or change the proceeding in any way, even if allowable. The term of office of the defendant expired in January, 1889, and we see no purpose which could now be reached by any proceeding of this nature. All that part of section 536 of the act entitled "An act to amend chapter 35 of the Code of Civil Procedure, being sections 534 to 542, inclusive," approved January 30, 1885, beginning at the words "and such action," in the fourth line thereof, to and including the words "in a civil action," in the eighth line thereof, must be declared unconstitutional and void, and the judgment herein must be reversed.



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Opinion of the Court—Logan, J.

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(March 11, 1889.)

## SMITH v. ANDERSON ET AL.

[21 Pac. 412.]

**COMMISSIONS OF BROKER.**—Where a party employs a real estate broker to sell a piece of real property at a stipulated price, at an agreed commission, and the broker finds a purchaser and introduces him to his employer, and afterward the employer sells the property to said purchaser at a less price and refuses to pay the broker his commission, held, the broker is entitled to his commission of ten per cent.

APPEAL from District Court, Bingham County.

J. T. Morgan, for Appellants.

The plaintiff has no cause of action unless the evidence shows that he brought to defendant a purchaser able and willing to pay for the ranch the stipulated price. (*McArthur v. Slauson*, 53 Wis. 41, 9 N. W. 784; *Cassady v. Seeley*, 69 Iowa, 509, 29 N. W. 432; *Bradford v. Menard*, 35 Minn. 197, 28 N. W. 248; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790; *McClave v. Paine*, 49 N. Y. 562, 10 Am. Rep. 431; *Wylie v. Bank*, 61 N. Y. 415; *Brown v. Pforr*, 38 Cal. 552, 553; *McGavock v. Woodlief*, 20 How. 221; *Dolan v. Scanlan*, 57 Cal. 261.)

Smith &amp; Smith, for Respondent.

No objection to the instructions can be considered, as no objection to them was made on the trial, and no objections reversed. (*Black v. City of Lewiston*, ante, p. 276, 13 Pac. 80; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. Rep. 960; *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. Rep. 119.)

LOGAN, J.—The plaintiff in this action alleges that in the month of August, 1886, the plaintiff, being engaged in the business of buying and selling real estate upon commission, was employed by the defendants to find for them a purchaser for a certain ranch, known as the "Booth Ranch," then the

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property of the defendants; that in case the plaintiff found a purchaser the defendants agreed to pay the plaintiff ten per cent upon the price for which said ranch should be sold; that plaintiff did find a purchaser for the ranch, and brought him to the defendants; and that thereafter the defendants sold the said ranch to such purchaser for the sum of \$6,000. The complaint contains a second cause of action, substantially the same as the first, except that the plaintiff claimed the right to recover upon a *quantum meruit*. The answer is substantially a general denial. Upon the issues raised the cause duly came to trial, and the jury rendered a verdict for the plaintiff, and assessed his damages in the sum of \$600. The evidence given at the trial was very brief, and upon the part of the plaintiff it was to the effect that he was employed by the defendants in the month of August, 1886, to find a purchaser for the Booth ranch, at the sum of not less than \$8,000; that during the month of November, 1886, he had a conversation with one E. A. Potter in regard to the purchase of said ranch, and that thereupon he took said Potter to the defendants, and introduced him to them; that he had been for some time negotiating the trade with said Potter while the ranch was owned by and in the possession of Booth; that Potter subsequently came to the plaintiff, and told him that he could buy the property from the Andersons, the then owners of the property, and employers of the plaintiff, for a less sum than he was offered the property by the plaintiff. It further appears that the plaintiff advertised the property for sale in certain newspapers, at his own expense, and that in January, 1887, he presented the advertisement to the defendants, and called their attention to it; that afterward, some time in May, 1887, defendants sold the ranch to said Potter for \$6,000, and received the money; that prior thereto, in the month of March, 1887, said defendants notified the plaintiff that he was not to act any further as agent to procure a purchaser for said ranch, and discharged said plaintiff from said employment, and said they did not desire to sell the ranch; that the plaintiff never did anything with reference to the sale after March, 1887, nor before, except as before testified; and that ten per cent on the purchase price was a reasonable fee for procuring the sale; and that he had

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been engaged in the real estate business for three years. The plaintiff then rested. Thereupon the defendants moved the court for a nonsuit, which motion was denied. No exception was taken to the charge of the court to the jury, and no requests were made by the defendants upon the court. The whole question, therefore, rests upon the very simple proposition as to whether the court was right in refusing to grant a nonsuit.

In considering the evidence upon a motion of this character we are bound to assume that the same was true, and to consider what natural inference the jury might arrive at from a consideration of the testimony. The plaintiff was employed by the defendants to do a particular thing—namely, to procure a purchaser for the ranch, at the sum of \$8,000, for which services he was to receive ten per cent. upon the purchase money paid. It appears that in the month of March, 1887, the defendants revoked, or attempted to revoke, the agency of the plaintiff, and in their notice of revocation they used the following language: That the plaintiff was not to act any further as agent to procure a purchaser for said ranch, and discharged the plaintiff from their employment, and stated further that they did not desire to sell the ranch. Yet, in the face of this statement, and about a month thereafter, they consummated a sale with the very person with whom the plaintiff had negotiated, and to whom he had introduced the defendants as a purchaser. It is also fair to presume that some negotiations had preceded the actual consummation of the sale, so that it could not have been very far from the time of the revocation by the defendants of the plaintiff's agency that the negotiations were taken up by the defendants in person. Considering these facts, and considering the fact that the defendants stated in their letter of revocation that they did not desire to sell the ranch, yet, in the very teeth of that statement, proceeding to sell, and to the very person to whom the plaintiff had introduced them, it was a fair inference from the testimony that the object of the letter of revocation was an attempt to deprive the plaintiff of his commission. (*Lloyd v. Matthews*, 51 N. Y. 124; *Martin v. Silliman*, 53 N. Y. 615; *Sussdorff v. Schmidt*, 55 N. Y. 319.) The evidence, although not very full, was sufficient to justify

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Points decided.

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the court in refusing the motion for a nonsuit. These defendants should not be permitted by their own act to deprive the plaintiff of his lawful commissions, and, the case having been submitted to the jury upon the whole evidence, and the jury having found a verdict for the plaintiff, we do not deem it proper, under the circumstances, to interfere with that verdict. The judgment is therefore affirmed.

Weir, C. J., and Berry, J., concurring.

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(March 11, 1889.)

LOCKHART ET AL. v. ROLLINS.

[21 Pac. 413.]

**EXCEPTIONS—STIPULATION EXTENDING TIME—WAIVER.**—When exceptions to evidence are taken during the trial, but such exceptions are not settled until two months after the trial, and more than a month after filing decision the appellant then having prepared a case embodying a bill of exceptions, in which bill the exceptions taken during the trial are included, and the case containing such bills allowed, and settled without objection in the presence of the attorneys for the respective parties, *held*, that such exceptions are not waived; *held*, also, that by the failure to object at the settlement the party is deemed to have agreed to the extension of time under section 2426 of the Revised Statutes of Idaho.

**LOCAL CUSTOM OF MINERS AS TO TRANSFERS.**—Evidence of local customs of miners, as to the manner of transfers of interests in mining claims, previous to July 26, 1866, is admissible.

**VERBAL TRANSFERS—CHANGE OF POSSESSION.**—Verbal transfers, if followed by change of possession, are valid as transferring claimant's interest.

**LABOR OF WATCHMAN—WORK DONE ON MINE.**—Where mining works are idle, time and labor of a watchman and custodian on the property in taking care of it is labor done on the claim.

**RELOCATION—OWNERS' RIGHTS.**—A party cannot make a valid relocation of lands legally possessed by another, until the owners' rights have been abandoned, forfeited or otherwise ended.

**AGENT OF NONRESIDENT OWNERS.**—The undertaking by one on the ground to procure a purchaser for a mining claim, the owner being nonresident of the territory and having no other agents in the territory to look after the claim, constitutes a fiduciary relation of such persons in relation to such property.

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Statement of Facts.

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**AGENT RELOCATING FOR HIMSELF.**—A person sustaining such fiduciary relation in respect to a mining claim cannot defeat the rights of his principal by relocating it for himself.

**SAME.**—If he so do relocate it, and benefit accrue from such act, the benefit accrues to the owner, and not to the relocater.

(Syllabus by the court.)

**APPEAL from District Court, Alturas County.**

This action is for the recovery of possession of a certain mining claim situate on Bear creek, Alturas county, Idaho, known as the "Ada Elmore Lode and Mining Claim." The complaint alleges that the plaintiffs have a "legal right to occupy and possess" the claim by virtue of compliance with all the requirements of law and rules of miners, and of actual prior occupancy of it as a mining claim; also that the defendant, on the fourth day of January, 1886, while in the employ of the plaintiffs as their agent, and as such agent in the actual occupancy of said property, made a relocation of the property adverse to the rights of the plaintiffs, intending the same to be for his benefit; that the defendant ever since such act wrongfully withheld possession from the plaintiffs, to their damage, etc.; and prays judgment for the possession of the premises, with damages for detention; and closes with a general prayer for relief. The answer is a general denial, but avers, among other things, that "the said alleged original locations on said Ada Elmore lode" consisted of several mining claims located thereon, by the discoverers thereof, in 1863, extending twelve hundred feet in length, along said lode, and no more, "with a width of one hundred feet; that prior to the nineteenth day of June, 1878, said Pittsburgh and Idaho Gold Mining Company had or claimed an interest in, or right of possession of, seven hundred feet undivided of said twelve hundred feet of said premises; that on that day the plaintiff, Charles Lockhart, as assignee of one Newton, a judgment creditor of said company, and purchaser of said interest of said company, under a sheriff's sale thereof, succeeded, by sheriff's deed, to whatever interest," etc., said company had in said premises; that thereafter, and until the defendant's discharge, in August, 1885, the defendant acted as agent for said Lockhart, in the care and supervision of said

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Statement of Facts.

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mining claim and business, and improvements connected therewith; that in 1883 the plaintiff Lockhart contracted with defendant to pay defendant for his services as such agent \$500 a year, beginning January 1, 1883, in consideration of which the defendant "agreed to take and keep the care and supervision of said property, business, and improvements; prevent waste thereon; preserve the possession thereof; attend to the payment of taxes and hire of laborers to perform the requisite annual labor, to be paid out of funds to be furnished by the said Lockhart." Alleges performance of such duties until his discharge, in August, 1885. Alleges payment of such salary for 1883 and 1884, and claims such salary as unpaid for 1885, up to July 31st of that year; and alleges that the assessment work for 1885 was not done, whereby, and "by force of the law," the claim "became forfeited and relegated to the body of public mineral lands"; and on the fourth day of January, 1886, he "located a claim as the 'Ada Elmore,' including said premises, of twelve hundred feet long, and one hundred feet wide, enlarging the location to fifteen hundred feet in length by six hundred feet in width; claiming such relocation for his benefit; and closing with prayer for judgment against said plaintiffs for the right of possession of his said Ada Elmore lode, and for costs, and that the judgment "be certified to the register of the land office," etc. The case was tried by the court without a jury, at the October term, 1887. Findings were filed December 10, 1887, and judgment for plaintiffs on such findings of fact and law was entered on that day. The findings and judgment affirm the right of the plaintiffs to all the lands described in the defendant's location of January 4, 1886. This part of the judgment is based mainly on the following findings of fact and conclusions of law: "The court finds as a fact that on the fourth day of January, 1886, a fiduciary relation existed between the plaintiffs and defendant, by reason of the employment of the defendant to procure for the plaintiffs a purchaser for the property included in the defendant's location of January 4, 1886, for a percentage of the proceeds of such sale as his commission," and as conclusion of law that the defendant, sustaining such fiduciary relation in respect to this property, acquired no

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Argument for Appellant.

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rights by his relocation—the lands so affected by this finding extending beyond the original claim in length two hundred and fifty feet, and on each side two hundred and fifty feet, the point of location at which defendant placed his notice being at the point of plaintiffs' shaft in the Ada Elmore lode claim. As to whether this finding of fact is sustained by the evidence, it was further found that, during the year 1885, the annual labor required by law (U. S. Rev. Stats., sec. 2324) was performed by plaintiffs on said Ada Elmore lode claim by caring for and maintaining the buildings and improvements thereon; and hence that the claim was not on the fourth day of January, 1886, subject to relocation. We shall consider these findings hereafter.

J. B. Rosborough, for Appellant.

It was error to admit oral testimony to show the location of a mining claim and transfers of interest therein, contrary to the statute of frauds. (*Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280.) The admission of sheriff's deed, without showing a valid judgment as a predicate, was error. (Freeman on Judgments, sec. 350; *People v. Doe*, 31 Cal. 220, 221; *Lanning v. London*, 4 Wash. C. C. 513, Fed. Cas. No. 8076.) In proceedings to determine adverse claims to locations of mineral lands, it is incumbent upon the plaintiff to show a location which entitles him to possession against the United States, as well as against the other claimant. (*Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110.) A valid location of a claim is not made by taking possession alone; and merely working mineral land gives no right of possession against a locator who complies with the regulations prescribed by law. (*Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197.) The right of possession is acquired only by such compliance. (*Belk v. Meagher*, 104 U. S. 279; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280.) Expenses of money and time in traveling about matters connected with a mining claim are in no sense labor performed on the claim. (*Du Pratt v. James*, 65 Cal. 555, 4 Pac. 562; *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 543.) A relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only

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against the prior locator, but all the world, because the law allows no such thing to be done. (*Belk v. Meagher*, 104 U. S. 284; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93.)

Lyttleton Price and Richard Z. Johnson, for Respondents.

Mining locations and transfers of mining property prior to 1866 may be proved by parol. Conveyances of claims prior to 1866 may be made by parol. (*Kinney v. Mining Co.*, 4 Saw. 382, Fed. Cas. No. 7827; *Mining Co. v. Taylor*, 100 U. S. 37.) Color of title, even under a void and worthless deed, has always been received in evidence that the person in possession claims for himself, and, of course, adversely to all the world. (*Pillow v. Roberts*, 13 How. 477; *Kennebec Purchase v. Laboree*, 2 Me. 275, 11 Am. Dec. 79.) A location may be made by an agent. (*Schultz v. Keeler*, ante, p. 333, 13 Pac. 481; *Gore v. McBrayer*, 18 Cal. 582-588; *Morton v. Mining Co.*, 26 Cal. 534; *Murley v. Ennis*, 2 Colo. 300; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.) A trustee or agent cannot deal with the subject of the trust or agency for himself. Equity will declare any act of the agent to be for the benefit of his principal. (Ewell's *Evans on Agency*, 255; *Story on Agency*, 210; *Cooley on Torts*, 526; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192, and note; *Ringo v. Binns*, 10 Pet. 269; *Bain v. Brown*, 56 N. Y. 285; *McMahon v. McGraw*, 26 Wis. 614; *Michoud v. Girod*, 4 How. 504; *Edmonstone v. Hartshorn*, 19 N. Y. 9.)

BERRY, J. (After Stating the Facts.)—A question of practice and of evidence is presented at the beginning of the consideration of this case. It appears that the findings of the court below were filed December 10, 1887, and judgment for the respondents was entered on that day; that a case was soon thereafter prepared, including assignments of error, presented for settlement, and settled and allowed, on the twenty-eighth day of January, 1888. The certificate of the judge states that such case, with assignments of error included, were "examined, settled and allowed in the presence of the attorneys of the respective parties." Both parties participated in the settlement, without objection. The respondents now claim



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that many of the alleged errors, if errors at all, were committed in the course of the trial, and the exceptions under the Revised Statutes, section 426, should have been settled at the time the decision was made, and, not having been settled for nearly two months after the trial, must be deemed as waived. The statute declares that such "exceptions must be taken and settled at the time the decision is made, and no order of the court shall be made for the settlement of such exceptions at any other time, except by the agreement of both parties." The action of the court in actually settling these exceptions on the 28th of January is equivalent to an extension of the time to that day. Both parties were present at such act, and took part in the proceedings, apparently without objection. Such tacit consent is equivalent to an "agreement of both parties." The settlement of the exceptions was therefore regular. The next question raised is as to the admissibility of the evidence of the local customs of miners in transferring interests or rights of possession in mining claims prior to July 26, 1866. The original locators of the Ada Elmore lode mining claim were six in number, and the witness Sawyer was one of them. In showing a transfer of the several interests of some of the several locators to the plaintiffs the witness Sawyer was asked: "Q. What were the customs as to the transfer of mining property in that district from 1863 to 1866, till the passage of the law of Congress that year? (Objection was made by appellant to the question and to proof of custom as irrelevant; that the evidence of such transfers should be in writing. The objection was overruled, and the witness answered.) A. I know the custom. It was by bill of sale or word of mouth. Either was good from 1863 to 1866 to a friend. To those unknown it was otherwise. We had no lawyers to write deeds. When a sale was made to a friend, he would just step into possession."

It was not error to allow this evidence. The act of Congress of July 26, 1866, clearly indicates that the rights of mining claimants may be subject "to the local customs or rules of miners"; they not being in conflict with the laws of the United States. It even allows those laws, customs and rules of miners in establishing the right of a claimant to enter and re-  
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ceive a patent to a mining claim. (*Tunnel Co. v. Stranahan*, 20 Cal. 199; *Mining Co. v. Taylor*, 100 U. S. 37.) The new location of the plaintiffs' claim is admitted in the answer; that prior to June 19, 1878, the Pittsburgh and Idaho Mining Company, one of the plaintiffs, had or claimed an interest of seven hundred feet of the twelve hundred feet of the Ada Elmore claim, and that the plaintiff Lockhart became the owner of it through a sheriff's deed, in an action against this company. Conveyances to said company were shown, covering the balance of said claim; also that plaintiffs had been in peaceful and exclusive possession of the claim, with claim of right, working or improving it, for nearly twenty years. There was other evidence tending to show that the plaintiffs were rightfully in possession of this property. On this point their claim of rightful possession was fully established. The finding of the court below on this point must be sustained.

But it is contended that the labor required by law was not performed in 1885, and that for that reason the claim in question was, at the beginning of 1886, open to relocation adversely to plaintiffs. By section 2324 of the United States Revised Statutes the holder of a mining claim, to maintain his right of possession, must see that "one hundred dollars' worth of labor shall be performed on such claim, or in improvements made thereon, during each year." The object of this requirement seems to be that the holder of a mining claim shall give substantial guaranty of his good faith. It cannot be from any desire on the part of the government to obtain the money of the locator. His right of possession does not depend upon any money consideration, but it is a right founded in public policy. It would be clearly against public policy for one to take and hold a mining claim for years, against all others who would be locators, merely that he might speculate upon it, with perhaps no design to develop it. Some guaranty of his good faith is required, as a condition of allowing him such exclusive possession. The labor is not required to be applied in any particular manner, but so that it is unquestionably devoted to such claim. (*McGarrity v. Byington*, 12 Cal. 426.) It must not be so as to raise a question as to its purpose. The exception made in the statute itself invites this construction.

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It is conceded that this labor may be in digging, erection of works for mining, in placing machinery, or in buildings on the claim, necessary for its working. In the case at bar the labor of the defendant, under hire of the plaintiffs, at the salary of \$500 a year, continuing at that rate to the thirty-first day of July, 1885, was in its character precisely what it had been for the two preceding years. His time was spent upon the property, in caring for it, and in protecting it from deterioration, loss or danger. It involved daily visitations in and over it, and into the works; in fact as the defendant himself testified, "in doing all that could be done with idle property." The exigencies of the mining business frequently require property of this kind to remain idle for a time, but that is not necessarily evidence of intent to abandon it. In this case, at least, the acts of the plaintiffs show that such was not their intention. The improvements to be taken care of and protected were valuable, and consisted of buildings, engine, boiler and machinery, hoisting works, etc.; and, from the defendant's evidence, presumably costing thousands of dollars. They had been constructed and used in the development of this mine. The plaintiffs, with them, had worked the mine for years, and when they needed repairs had repaired them. The hoisting works had to be rebuilt, while the defendant was in charge of the property, at a cost of \$2,300. All that was done by the defendant for the plaintiffs in 1885 was clearly in pursuance of their former well-established purpose.

The question as to what shall be understood as "labor upon mines," buildings, etc., has been much discussed, in cases of mining claims; more frequently, perhaps, in cases of liens for labor done. The cases have mostly arisen under claims for miners' or mechanics' liens. While the words of the various statutes are not always identical, there is a general uniformity in the words used in these laws with the statute requiring this annual labor upon mining claims. Practically, where the claim is for work done, the statutes require it to be done on the property. The case of *Rara Avis etc. Min. Co. v. Bouscher*, 9 Colo. 385, 12 Pac. 433, decides what shall constitute labor done "in or upon" mining claims, under the lien law of that state. The law (Colo. Gen. Laws, sec. 1655) reads: "All miners, la-

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borers, and others, who work or labor in or upon any mine," etc., "shall have a lien," etc. The court holds that services of a superintendent of mines, in planning or superintending the erection of a mill, and machinery, are work or labor, in or upon the property, within the meaning of the statute. So in Utah (Comp. Laws, sec. 1221) one who shall do work "upon any mine shall be entitled," etc. In a case founded upon this statute (*Mining Co. v. Cullins*, 104 U. S. 176) the court say: "It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien and that which is merely professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of Utah, that an architect who furnishes plans, and superintends the erection of a building, acquires a lien thereon for work and labor"; and cite *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, and note; *Insurance Co. v. Rowland*, 26 N. J. Eq. 389, and other cases. In that case the claimant of the lien was an overseer and foreman of a body of miners, and his claim was held good. If it be said that these cases go rather to what shall be deemed work, we answer that is precisely the case at bar. There can be no question that whatever was done was done on the plaintiffs' claim. So in Oregon, under section 1, chapter 32 of the Laws of Oregon, under a like statute, the court in *Falls Co. v. Remick*, 1 Or. 170, give a like construction.

All the authorities cited by the appellant on this point are consistent with the same view. The strongest case cited for the appellant is that of *Du Prat v. James*, 65 Cal. 555, 4 Pac. 562. A party had leased a mill, located about a quarter of a mile from his claim, but whether for the sole purpose of developing his claim does not appear. He made efforts, at first unsuccessful, to get water from a ditch to operate the mill, and traveled to distant places, to see agents of a ditch company, to get water for, as he claimed, the same purpose, and incurred expenses in time and money in doing so. Having succeeded, however, in getting water, "he did not use it, or attempt to crush rock or ore." None of these acts were done on the claim, nor were they necessarily connected with this mine. Indeed, his failure to use the water after he had obtained it raises a

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strong presumption that he did not intend to do so; at least, not to develop this mine. The court, properly as we think, held this expenditure was not on the mine, in the sense intended. The case cited (4 Pac. 562) is the same as that last commented upon. The case of *McGarrity v. Byington*, 12 Cal. 426, by implication, at least, favors the view we take upon this subject. It holds that "work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it"; clearly implying that, when its purpose is self-evident, it is within the statutes by intendment, if not literally. The personal services of this agent were work and labor. They were performed on the property. They were in aid of the development of this claim. They tended as directly as acts can tend to show the good faith of the plaintiffs, and their purpose not to abandon the mine; at least up to the time they had expended in its preservation (in 1885) labor to the value of \$333.

But it is contended that the plaintiffs have not yet paid for this labor. That does not affect the fact that the labor was done by their procurement. The defendant did it for hire, and may recover for the services under his contract. We conclude that on the fourth day of January, 1886, the Ada Elmore lode mining claim was not open to relocation adversely to the plaintiffs. (See *Morgan v. Tillottson*, 73 Cal. 520, 15 Pac. 88.)

But the court below goes further, and holds that the relocation made by the defendant inures to the benefit of the plaintiffs. Under the pleadings such relief can be had. The conclusion is based upon a finding of fact that, at the time of relocation, the defendant sustained a fiduciary relation to the plaintiffs respecting this property. From the evidence it appears that one W. N. Frew, of Pittsburgh, Pennsylvania, where the plaintiffs resided, and still reside, for about eight years next prior to the beginning of this action acted as agent of the plaintiffs, and as such had been known to and dealt with by the defendant. It was through Frew that defendant was in plaintiffs' employ about the premises from 1883 to July 31, 1885. There was much and constant correspondence between

## Points decided.

the defendant and Frew; and on the termination of the defendant's services in caring for the property, July 31, 1885, through Frew defendant was tendered the further service of finding a purchaser for the property at such sum as the plaintiffs would be willing to take, he to receive a percentage of the proceeds for his commission on completion of the sale. The defendant undertook to procure such purchaser, but none had been found up to the beginning of 1886. From this the court held the relations of the defendant with the plaintiffs, with reference to this property, were so far of a fiduciary nature that he would not be permitted to relocate the subject of his trust, for his own benefit; but what he did by way of enlarging the boundaries of the claim was done for the benefit of his principals, subject to their right of election to accept the same. We think the court below was correct in so holding. Numerous authorities are cited by the respondent in support of this decision, but the principle is too well settled to admit of controversy, and we omit citations. The order denying a new trial is sustained, and the judgment is affirmed.

Weir, C. J., and Logan, J., concur.

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(March 19, 1889.)

WASHINGTON AND IDAHO RAILWAY COMPANY v.  
NORTHERN PACIFIC RAILWAY COMPANY.

[21 Pac. 658.]

LANDS GRANTED TO NORTHERN PACIFIC RAILWAY COMPANY BY CONGRESS—LAW CONSTRUED.—Section 3 of the act of Congress of July 2, 1864, provides: "That there be and thereby is granted to the Northern Pacific Railroad Company (for the purpose of securing the construction of a railroad and telegraph, etc.) every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt, . . . free from pre-emption of other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office," etc. *Held*,

Argument for Appellant.

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to be a grant *in praesenti*, and to vest in the company an equity in the lands, subject to be defeated, however, on noncompliance with terms of the grant.

ACT OF CONGRESS OF MARCH 3, 1875.—*Held*, also, that lands included in such grant are not within the operation of the act of March 3, 1875, granting the right of way to railroads, etc.

APPEAL from District Court, Shoshone County.

Woods & Heyburn, for Appellant.

The language of the act under which the plaintiff claims its grant reads: "That the right of way over the public lands of the United States is hereby granted to any railroad company, etc." Public lands within the meaning of the act are those lands the title of which remains in the United States. They are termed public lands, because all the people of the country have an interest in them. The fact that they are temporarily reserved from sale does not affect their character as public lands. (*Bouldin v. Phelps*, 30 Fed. 554, 555.) The title remains in the United States until the conditions imposed are all complied with. (*United States v. Taylor*, 35 Fed. 486; *Bouldin v. Phelps*, 30 Fed. 547; *Northern Pac. R. R. v. Traill Co.*, 115 U. S. 600, 6 Sup. Ct. Rep. 201.) "The grant being inchoate, the valid legal title still remains in the government. Where the case remains *sub judice*, the legal title cannot pass out of the United States, and the United States stands in an impregnable position on that legal title, even though such title be held by the United States for those having the equitable title to the lands." (*Bouldin v. Phelps*, 30 Fed. 554, 555, 558, 564; *Estrada v. Murphy*, 19 Cal. 271; *Malarin v. United States*, 1 Wall. 290; *United States v. Taylor*, 35 Fed. 486.) It is the settled law of the land that these acts cannot be questioned in a collateral proceeding, but must stand as valid and binding upon all of the world until the grant is set aside by the court in an action commenced in the name of the United States for that express purpose. (*Steel v. Smelting Co.*, 106 U. S. 451, 1 Sup. Ct. Rep. 389; *Kemp v. St. Louis Smelting Co.*, 104 U. S. 636.)

J. H. Mitchell, Jr., and Albert Hagan, for Respondent.

Same as in 21 Pac. 658.

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BERRY, J.—This case comes into this court on appeal from a judgment entered in favor of the defendant upon an order sustaining a demurrer to the complaint. Stripped of all minor questions, and which are not essential to the case, the main issue, and that on which all else in the case depends, is as to which party is entitled to the possession of certain parts of sections 25 and 27, in township 49 north, of range 1 east, of Boise meridian, in Shoshone county. The plaintiff claims a right of way for its road through them, under the act of March 3, 1875. It claims to have fulfilled all the conditions of that act, and compliance with all the rules and regulations of the land department of the United States; and that since the third day of November, 1886, it was and is entitled to all the benefits of the act of March 3, 1875, whatever those rights may be. The complaint demands judgment, declaring the company's ownership of a right of way for the plaintiff's road on and over these two sections of land with right of possession, etc. The defendant, on its part, claims both of these sections, under the land grant to the Northern Pacific Railroad Company by act of Congress, July 2, 1864. The lands are a part of the public domain, and subject to the operation of the act under which the plaintiff claims, unless they are removed from the operation of that act by the grant previously made to the defendant. The act of Congress of March 3, 1875, grants to railroad companies complying with its conditions the right of way over the public lands of the United States, except such lands be contained within "any military, Indian, or park reservation, or the lands shall be otherwise specially reserved from sale." The case made by the plaintiff shows its right to a right of way over the lands, providing the defendant has not a prior claim. It is contended by the defendant that the odd sections "within the forty-mile limit" of its grant are not "public lands," within the meaning of the act of March 3, 1875, but that they are private property, granted to the defendant for certain purposes, specified in the granting act, and in which the defendant, prior to the act of 1875, had a vested right. In support of this claim the defendant cites section 3 of the granting act to the defendant, of July 2, 1864, providing "that there be, and hereby is, granted to the Northern Pacific Railroad



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Company [for certain specific purposes in the act declared] every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, . . . free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office," etc.

Whether this act did or did not vest in the defendant a present property in these lands, which would become absolute as of the time its plat of route should be filed, against pre-emption or other claims arising after the date of the act, has been the subject of some discussion in the courts, and the decisions, at first view, are apparently conflicting. We think this supposed conflict is more apparent than real, and arises chiefly from changed circumstances under which the same and similar acts have from time to time been considered. The policy of the United States with reference to the public lands has ever been to retain their primary disposal exclusively to itself. With that exclusive control it will allow no interference, either by state or territorial governments, nor by any means which itself does not institute and put in motion; and we are cited to no case, and know of no case, where the government of the United States has ever allowed the public lands to be made subject to taxation and sale for taxes, under state or territorial laws, so long as it for any purpose holds the title. Improvements on public lands may be taxed, and often are taxed, as personal property, and sold for taxes, but the soil, never. The reason is obvious. A departure from this rule will not be presumed for reasons less than a plain declaration by Congress of such intent. There is no such intent expressed in this grant, and the intent will not be implied as against the government. (*Railroad Co. v. United States*, 92 U. S. 733.) What the company may do, in pursuance of the expressed object of the grant, in the sale and transfer of equities in lands, whether earned and title perfected, or the equities still inchoate, is quite another thing.

For reasons satisfactory to Congress, under a clear right reserved in the government to do so, and by express provision of

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the act of July 15, 1870, the title to these lands has been retained in the government; and it will not, except through the authorized acts of the grantee, done in pursuance of the objects of the grant, and on full compliance by it, with its obligations to government, part with the legal title to the property granted. The making of these lands subject to taxation by territories or states was not one of the expressed objects of this grant. Its purpose was not to expose it to confiscation, but to devote it to the building of a railroad and telegraph line from Lake Superior to the Pacific. To do that, means were prescribed by Congress by which the company might mortgage its franchises and property, including these lands, to raise money for that purpose; but to allow the lands to be encumbered by taxation would at once raise a barrier to the object for which the grant was made, and tend, at least, to defeat its real purposes. Any presumption that Congress intended, by putting these lands in the hands of the company, practically in trust with a beneficial interest in the trustee, for a specific purpose, to subject them to immediate taxation, as soon as the line of the road should be established, or even as soon as the lands should be earned by the completion of the road, or any section of the road, would necessarily lead to the most serious and absurd consequences; and if we were to look no further than the original grant, with its expressed object and intent, with the known uniform policy of the government, in having no partner in the primary disposal of its soil, such a decision as that of *Northern Pac. R. R. Co. v. Traill Co.*, 115 U. S. 601, Sup. Ct. Rep. 201, might *Co. v. Traill Co.*, 115 U. S. 601, 6 Sup. Ct. Rep. 201, might soon given for that decision. That was based on the fact that the government had a lien on all such lands for the cost of surveying, selecting and conveying the same, which cost the grantees were to pay, and in default of which payment the government might be obliged to retake or redispense of the lands. The interest of the road in the lands is not such an interest as to subject the lands to territorial taxation, and so that case decides. But it does not follow from anything in that case that the beneficial interests of the company in the grant are any less, or any different, from that implied in the obvious meaning of the words of the statute, taken with other por-

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tions of the granting act, and the act of July 15, 1870, reserving this power in the government. In construing the act, the nature of the trust, the character and relations of the grantor to the property granted, its rights secured by holding the title, its uniform policy and practice in avoiding complications in the primary disposal of its lands, and the detailed statement of the object of the grant itself, must not be overlooked. Subject to these specified conditions, it seems clear that the conclusion arrived at in *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100, must be taken as the true rule, in defining the estate and interest of the defendant in the lands so granted. Other cases define it quite as explicitly. In that case the court holds that the land in controversy, "and other lands in Dakota, through which the Northern Pacific was to be constructed, was within what is known as 'Indian country' at the time the act of July 2, 1864, was passed. The title of the Indian tribes was not extinguished, but that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy—a right to use the lands, subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy, and the railroad company took the property with this encumbrance." There is no question of "encumbrance" here; hence there was nothing to be "removed" before the rights of the company attached. The court declares that the company "took the property." The counsel cites on this point, *Schulenberg v. Harri-*  
*man*, 21 Wall. 44, which case fully sustains this view; also *Railroad Co. v. United States*, 92 U. S. 733; *Missouri etc. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Railroad Co. v. Baldwin*, 103 U. S. 426—all of which cases, considered with reference to their particular circumstances, appear consistent with *Northern Pac. R. R. Co. v. Traill Co.*, cited above, and no reason appears to question the correctness of their conclusions.

It is not necessary to inquire as to which of the excepted classes of lands, named in the act of 1875, includes the sections in question in this action, or whether they are in either class. The United States had already granted these lands, subject, of course, to the reservations and conditions of the act of July

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2. 1864, and to the requirements of the act of July 15, 1870, hereafter mentioned, when the act of March 3, 1875, was passed. It is admitted in the complaint that the sections of land here in question are now "within the forty-mile limit" of the defendant company; and from the complaint, which was demurred to, it is not apparent that they were not within such limit at any time. It is not pleaded that any previous location of the defendant's road had been definitely made, so as to leave these sections out of that limit, on the 3d of November, 1886, at which time full compliance with the act of 1875 was completed by the plaintiff; and the plaintiff became entitled to its right of way over government lands under that act, and we cannot look into the maps submitted, which are not a part of the complaint, nor indeed altogether consistent with each other, for the discovery of a fact of which the face of the complaint does not give notice. Undoubtedly, if such were the fact when the right of the plaintiff attached, and a change in the defendant's line was made afterward, so as to include these sections, and it were so stated, such fact would demand attention. But such is not the condition of this case.

We see nothing in the point taken under the act of Congress of July 15, 1870, "that while the cost of surveying, selecting, and conveying the lands granted to a railroad remains unpaid, the legal title of the lands remains in the United States; that the cost of surveying the land is a condition precedent to the right to receive the title from the government"; and that in such case the equities of the defendant are extinguished or impaired, as claimed under the authority of *Railroad Co. v. McShane*, 22 Wall. 444. The act, under reserved power to amend and modify the grant, merely imposes another condition precedent to the government's obligation to patent the lands, to wit, that certain costs of survey, selection and conveyance shall be paid. It goes no further, and we think this retention of title in the United States must be considered as a holding of the naked, legal title only, retained, primarily, at least, as security for the cost of surveying, selecting and conveying the lands, but leaving the equities of the company in the lands themselves entirely intact. Such, if we understand them, is the view taken by Judges Field and Deady in *United States v.*

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Argument for Respondent.

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*Ordway*, 30 Fed. 35. It is apparent, therefore, that the defendant had a vested interest and property in this land, prior and superior to any claim of the plaintiff under the act of March 3, 1875. The judgment in this action should be affirmed.

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(March 18, 1889.)

WASHINGTON & IDAHO RAILROAD CO. v. OSBORNE.

[21 Pac. 421.]

**POSSESSORY CLAIM TO PUBLIC LANDS.**—Where a party purchases the right of possession of persons, who had located and settled upon agricultural land belonging to the United States, and thereafter resided constantly upon the same, and was qualified in law to initiate proceedings to obtain title thereto, held, that the party is the owner of the land against all persons except the United States.

**RIGHT OF WAY—COMPENSATION.**—The plaintiff railroad corporation has no right of way over defendant's land, and cannot enter upon it and take it from the possession of defendant without due compensation.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County.

W. W. Woods and W. B. Heyburn, for Appellant.

Occupation and improvement on the public lands, with a view to pre-emption, do not confer a vested right to the land so occupied. (*Frisbie v. Whitney*, 9 Wall. 187; *Aurora Hill Consol. Min. Co. v. Eighty-five Mining Co.*, 34 Fed. 520; *Bouldin v. Phelps*, 30 Fed. 564; *United States v. Taylor*, 35 Fed. 486; *Union Pac. Ry. Co. v. Douglass Co.*, 31 Fed. 540.)

Albert Allen, for Respondent.

If possessory claims exist at the time a railroad company complies with the act of March 3, 1875, by filing its articles of incorporation and proofs of organization, then a right of way must be purchased pursuant to section 2288 of the Revised Statutes, or condemned in pursuance to section 3 of said act of March 3, 1875. (*Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. 229; *Railroad Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125.)

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Opinion of the Court—Weir, C. J.

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WEIR, C. J.—This is an action brought by the plaintiff, in which it appears that the plaintiff, as a duly organized corporation, has duly filed its certificate of incorporation and due proofs of its organization, under the act of March 3, 1875, and is entitled to a right of way for the purpose of constructing its railroad over the public lands of the United States; that the defendant claims that he is the owner of a part of said public land, and that he is entitled to the possession of the same as against the plaintiff; that thereupon, on the twenty-eighth day of July, 1888, plaintiff commenced proceedings in condemnation against said defendant to condemn the right of way for its road over and through the land so claimed by the defendant; that upon such proceedings the district court on the thirteenth day of August, 1888, appointed commissioners to appraise and assess the damages which the said Osborne would suffer by reason of the said condemnation for plaintiff's right of way; that the commissioners took testimony, and reported, after viewing the premises and hearing the testimony, that the total damage sustained by the defendant by reason of the taking of the premises by the plaintiff were \$6,670. The plaintiff declines to make tender of that sum, or any sum, to the defendant, upon the ground that the defendant is not entitled to the possession of the premises as against the plaintiff. Plaintiff offers to pay the money into court, and abide the determination of the question, and thereupon proceeds to ask judgment that it may be decreed to be the owner and entitled to the possession of the land, and also be entitled to enter upon the same for the purpose of constructing its railroad without the payment or tender of the damages so found by the commission; and asks for an injunction restraining and enjoining the defendant from interfering with it in the construction and operation of its road. The defendant, answering, alleged that he was in all respects qualified in law to initiate proceedings to obtain title to one hundred and sixty acres of agricultural land belonging to the United States; that the land upon which defendant was in possession was located and settled upon in the year 1885 by one Seth McFarren and Samuel Norman, who in that year built a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundary as

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defined by their corner stakes; that said McFarren and Norman resided constantly upon the said property, living in the dwelling-house aforesaid, and constantly engaged in inclosing and improving the same during the year 1885 and down to March, 1886, at which date the defendant duly purchased the same from them, paying therefor the sum of \$2,000; whereupon the defendant went into possession of the entire tract of land comprising one hundred and sixty acres, with the intent in good faith to initiate and perfect the title thereto under the homestead or pre-emption laws of the United States; and that since that time the defendant has resided upon the ranch continuously, constantly improving the same, and completed the inclosure thereof; and that altogether he has expended the sum of \$8,000; exclusive of the sum of \$2,000 heretofore paid therefor, as aforesaid. The defendant further alleged that the proposed right of way of plaintiff goes through the center of defendant's garden, which defendant has thoroughly reduced to cultivation and set out in orchard; and conceded that the land is unsurveyed public land of the United States.

The appeal in this action is from the judgment and decree only. It does not appear that any motion for a new trial has been made, or any statement been filed in pursuance of section 4443 of the Revised Statutes of Idaho. We can, therefore, in disposing of this case, consider only the judgment-roll. If that appear to be correct, the judgment must be affirmed. (*Gamble v. Dunwell*, 1 Idaho, 268; *People v. O'Conner*, 1 Idaho, 759; *Purdy v. Steel*, 1 Idaho, 216; *Caney v. Silverthorne*, 9 Cal. 67.) The findings of the court in this case are conclusive of the facts, and the only question that remains is whether the conclusions of law are supported by the findings of fact. The court found as a matter of fact that on the fifth day of July, 1886, the plaintiff became a duly organized corporation under the laws of Washington territory, for the purpose of constructing and operating a railroad through a certain part of Shoshone county, and on the eighth day of November, 1886, filed amended articles of incorporation extending the line which the plaintiff proposed to construct. The property in question is covered by the extension. The court further finds that the defendant is a native-born citizen of the United States, has never had the

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benefit of the pre-emption or homestead laws, and is in all respects qualified in law to initiate proceedings to obtain title to one hundred and sixty acres of the agricultural land belonging to the United States; that the lands in question are part of the unsurveyed public land of the United States, and agricultural in character; that the premises in question were settled upon in the year 1885 by Seth McFarren and Samuel Norman, who proceeded to erect buildings thereon, and located the same, as required by law; that, on the eighteenth day of March, 1886, in consideration of \$2,000, these parties sold and conveyed to the defendant all the improvements upon the said premises, and the right of possession which the said parties then had; whereupon said Osborne entered into possession, and continued in possession up to the time of the commencement of this action, and has duly located the said section, as required by law, and filed in the office of the county recorder of Shoshone county, Idaho, his declaration to hold said premises under the pre-emption law under the possessory land act of the territory; that during all the time since the eighteenth day of March, 1886, defendant has resided upon the premises, making the same his home, and has made large and valuable improvements thereon; and that he intends to obtain title to said premises under the pre-emption laws of the United States, as soon as the same shall be surveyed by the government. As conclusion of law from these facts the court found that the defendant is now, and at all times since the eighteenth day of March, 1886, has been, the owner of, as against all persons except the United States, and in possession of, the land and premises described in the answer; that the title and right of possession of defendant in and to said premises are prior to and paramount to the right of way of the plaintiff over the said premises; and that the plaintiff has no estate or interest in or to the right of way over and across said premises, or any part thereof, as against the defendant; that defendant is entitled to a judgment and decree of this court, and that he have judgment for the costs.

The only question presented in this case is whether the defendant's possessory claim can be taken by the plaintiff without compensation. It appears that the defendant's right was acquired before the organization of the plaintiff, and that the plaintiff had



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Points decided.

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no right whatever. The act of March 3, 1875, provides that the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned. (Section 3 of said act.) It is under this act that the plaintiff claims its right. The legislature of Idaho has provided a law for the condemnation by railroad companies of the right of way over possessory claims. (Rev. Stats., tit. 7.) Congress itself by the act seemed to provide for condemnation of possessory claims, and undoubtedly the defendant's claim was a possessory one, and this plaintiff could not enter upon it and take it from the possession of the defendant, unless it had a prior right, without due compensation. The question of a rule of damages in a case of this kind, where the property itself is property of the United States, is another question, but is not presented for our consideration in this case. It appears from an examination of the judgment-roll that it is in all respects regular, and that the conclusions of law are sustained by the findings of fact. The judgment is therefore affirmed, with costs.

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(March 19, 1889.)

## UNITED STATES v. LANGFORD.

[21 Pac. 409.]

**FACTS AS TO GUILT—GENERAL REPUTE OF GUILT.**—It is not proper for the court to allow evidence of the general repute of the defendant in the neighborhood in which he lives in order to establish that guilt. The facts themselves must be shown, and it is for the jury to draw inferences.

**IMPROPER INSTRUCTIONS.**—Nor is it proper for the court to charge the jury that if the defendant has by his acts induced others to believe, or the public to believe, that the defendant has cohabited with more than one woman, that his acts are unlawful.

**IMPLIED BIAS—SETTING ASIDE VERDICT.**—The court will not disturb the finding of a trial judge upon the question of implied bias, unless it is so clear a case as would warrant a judge in setting aside the verdict of the jury as against the evidence.

(Syllabus by the court.)

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Opinion of the Court—Logan, J.

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APPEAL from Third District Court, Bingham County.

John W. Langford was convicted of bigamy, and appeals. Reversed.

Smith & Smith, for Appellant.

The court had no jurisdiction to try this cause, as the indictment shows that the offense charged was committed in Bear Lake, instead of Bingham county, and this court takes notice that Blackfoot is in Bingham county. (U. S. Rev. Stats., secs. 1910, 1914; *Clinton v. Englebrecht*, 13 Wall. 434; *Reynolds v. United States*, 98 U. S. 145; *Miles v. United States*, 103 U. S. 304.) Consent to a wrong is not given by silence in a criminal case. (*People v. Dick*, 37 Cal. 277; *People v. Beeler*, 6 Cal. 247; *People v. Payne*, 8 Cal. 344; *People v. Demint*, 8 Cal. 424; *People v. Ah Fong*, 12 Cal. 347; *People v. Woppner*, 14 Cal. 437; *People v. Sanford*, 43 Cal. 29; *People v. Prospero*, 44 Cal. 186.)

James H. Hawley, United States District Attorney.

The presumption in the supreme court is that the proceedings below were correct, except in so far as the records show the contrary. (*People v. McAuslan*, 43 Cal. 55.)

LOGAN, J.—The defendant was indicted by a grand jury of the United States at Blackfoot, Idaho territory, at the June term of court, A. D. 1888, for a violation of section 3 of the act of Congress approved March 22, 1882, chapter 47, entitled "An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes." Under this indictment the defendant was tried and convicted on the twelfth day of October, 1888, and from that judgment he has appealed to this court. The errors which it is claimed by the defendant were committed by the court below are as follows: "1. Error in overruling defendant's challenge to the jurors Henry Meyers and Thomas Holcomb. 2. Error in permitting counsel for the government to ask the following question: 'What was the general repute in that community as to the relations existing between defendant and Rhoda Dimmick?' 3. Error in the re-

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Opinion of the Court—Logan, J.

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fusal of the court to charge certain requests made by the defendant, and error as to certain portions of the charge which the court actually delivered to the jury.

As to the first assignment of error, the jurors were challenged for implied bias, and, in the absence of the proof or evidence upon which the court below decided the question of implied bias, this court is bound to presume that the decision of the court below was fully sustained by the evidence. The decision of the question of implied bias is one of fact, and will not be disturbed by an appellate court, unless it is so clearly against the evidence as would warrant a judge in setting aside a verdict of the jury as against the evidence. (*Reynolds v. United States*, 98 U. S. 145.) In order to establish an offense under section 3 of the law of Congress mentioned above it becomes necessary for the government to show that the defendant actually cohabited with more than one woman. We have already laid down, in the case of *United States v. Kuntze*, ante, p. 480, 21 Pac. 407 (decided at this term), what is meant by the term "cohabit" in this section, and defined it to mean, "To dwell or live together as husband and wife." It therefore becomes necessary for the government, in order to convict the defendant, to show that the defendant cohabited with more than one woman, or did dwell or live together with more than one woman as husband and wife. This was the substantive fact to be proven, and the only manner in which it could be proved would be to establish the acts of the defendant, and from these acts it is for the jury to say whether he has dwelled or lived together with more than one woman as husband and wife. The facts themselves are to be proven, and the inference to be drawn from the facts is a question for the jury. It was therefore manifestly improper for the government to ask the question which was asked and allowed by the court in this case. The question itself, if answered in the affirmative, assumed all the facts which were necessary to be proven in order to establish the guilt of the defendant. The defendant's guilt may be established by his own acts, but certainly to assume the guilt without proof of the acts would be manifestly improper. Proof of marriage was not necessary, but proof of cohabitation was; and under no circumstances would this form of question be

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Opinion of the Court—Logan, J.

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proper in a case of this kind. Cohabitation might be inferred by the jury from the acts of the defendant, but such acts should not be inferred from general reputation. In this case the evidence which preceded this question, so far as it appears from the bill of exceptions, would not warrant the question, and, in fact, tended to prove nothing. It is claimed that the case of *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. Rep. 278, is an authority for such a question. We are unable to view the case in that light. It appears there that facts were proven from which the court held the jury might infer guilt, but no such question was asked or commented upon. We are unable to find any authority warranting such evidence. (1 Greenleaf on Evidence, sec. 107; 2 Greenleaf on Evidence, sec. 461.)

The next assignment of error is the charge of the court to the jury, which was given at the request of the prosecution, as follows: "In determination of this you will consider whether, under the facts as proved, the acts of the defendant have been such as to lead the public to believe that the relations of husband and wife still continued. If they have been such as to induce others to believe, or the public to believe, that the marital relations still continue, then the acts of the defendant are unlawful." To this portion of the charge the defendant excepted. We think this exception is well taken. If the court had charged the jury that if, from all the facts which had been proven in the case (if there were any), they came to the conclusion that by such acts the defendant had held out to the public that the marital relation existed between himself and the two women named in the indictment, that then they should find the defendant guilty, the charge might have been proper; but the court did not so charge. Taking into consideration the evidence which had been admitted, and the charge of the court as given, it is clearly misleading; for in it the jury were told, in effect, that, if the defendant had by his acts induced the public to believe him guilty, then they must find him guilty. Nothing was said in regard to the acts which must be the foundation of public opinion; nothing was said as to what public was referred to; but merely that, if the acts have been such as to induce others to believe, or the public to believe, that the mari-

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Opinion of the Court—Berry, J., Dissenting.

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tal relations still continued, then the acts of the defendant are unlawful. The charge of the court in this case was not very full, and did not explain to the jury the facts that were necessary to be proven in order to establish this belief in the public; but by the admission of the testimony which we have already referred to it may well be supposed that the jury, without knowledge of any facts, found the defendant guilty merely upon the general proof that his acts had been such as to induce others or the public to believe him guilty. It may well be said that this was a conviction based upon public opinion.

It is again claimed that *Cannon v. United States*, *supra*, is an authority for this charge. We think it just the opposite. If a defendant of this kind cannot be convicted without the invention and application of new rules of law, it is better he should be acquitted.

It is unnecessary in this case to consider the question of the jurisdiction of the court. This question has already been considered and disposed of in the case of *United States v. Kuntze*, ante, p. 480, 21 Pac. 407 (decided at this term of the court); nor is it necessary to consider any of the other alleged errors in this case. It follows that the judgment must be reversed, and a new trial granted.

Weir, C. J., concurs.

BERRY, J., Dissenting.—This case comes up on a bill of exceptions. The evidence given in the court below is not brought up. Whenever, therefore, the lawfulness of proceeding upon the trial depends on the evidence given at the trial, the presumption is that the requisite evidence was given. The majority of the court think there were two instances of error on the trial: 1. In the charge of the court to the jury; and 2. In allowing evidence of repute in the family and community where the defendant resided, as to the nature of the relations of the defendant with the woman in question, and whether they were regarded in the family and community as those of husband and wife.

On both of these points I am constrained to dissent.

First, as to error in the charge. The alleged ground of this is as follows: Evidence had been given, and the fact was not

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Opinion of the Court—Berry, J., Dissenting.

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denied, that for years previous to the first day of June, 1886 (the beginning of the time alleged in the indictment as the beginning of the time covered by the unlawful cohabitation), the defendant, having a lawful wife still living, had publicly lived and cohabited with another woman, one Rhoda Dimmick, as his wife; that he had at least one child by her. She went by his name, and was in that community known and recognized as the defendant's plural wife. It was stated by defendant in his own behalf, on the trial, that on or shortly prior to the first day of June, 1886, it was agreed between said defendant and Rhoda Dimmick that they would thenceforth live separate and apart. It was shown that the defendant still supported said Rhoda and her child as formerly, and that he was seen at her house. After the cause was summed up, the court charged the jury that "if from all the evidence you are satisfied beyond a reasonable doubt, that the defendant has cohabited with the woman in question at the time or any part of the time mentioned in the indictment, it will be your duty to find the defendant guilty; but if, on the other hand, you shall not believe from the evidence, beyond a reasonable doubt, that the defendant has so cohabited with said Rhoda Dimmick, then you will find a verdict of not guilty. In this case you cannot find the defendant guilty unless you find from the evidence that defendant has lived with his wife and with Rhoda Dimmick, in the habit and repute of marriage, as to both of said women, between the first day of June, 1886, and the eighth day of June, 1888; and if you find that prior to June 1, 1886, they separated by agreement, and ceased their relations of husband and wife, and made the termination of those relations notorious and public, and wholly and publicly repudiated those relations, and have not since lived together, or continued such marital relations in public or privately, and that he has only contributed property to her support, but not as to a wife, then this does not constitute such a cohabitation as is condemned by law, and it would then be your duty to find him not guilty. This change of relations must be real, and not merely colorable and unreal. It is not the object of the law to punish for acts of justice or benevolence. There is a wide distinction between such acts, and such as the law prohibits. The example before the public

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and the influence of such acts are widely different. In the determination of this you will consider whether, under the facts as proved, the acts of the defendant have been such as to lead the public to believe that the relations of husband and wife still continued. If they have been such as to induce others to believe, and to induce the public to believe, that the marital relation still continued, then the acts of the defendant are unlawful." A portion of this charge embodies a request of the defendant's counsel. The part embodying the request is from the words, "in this case the jury," to and including the words, "find him not guilty." The court declined to give as requested, except as modified at the places where those words occur, by inserting the words, "and made the termination of those relations notorious and public, and wholly and publicly repudiated those relations"; also, "or continued such marital relations in public or privately"; also, "but not as to a wife."

It will be seen that the counsel for the defendant himself assumed, and the court assumed, as it was in fact proved that up to about June 1, 1886, the defendant had lived in the repute of matrimony with Rhoda Dimmick; that on the strength of this alleged agreement with Rhoda, testified to by the defendant himself, and which nobody but he appears to have even suspected, he seeks to evade punishment. With the amendments was given a statement of their true intent and meaning. On any fair reading it only amounts to this: that as the public relations of the defendant and Rhoda up to June 1, 1886, had been those of husband and wife, those relations would be presumed so to continue until there was some change visible to others in their relations. How long that presumption would obtain is another question. But if it hold any considerable time after the 1st of June, 1886, it brings the case within what those continuing relations were. This was competent as showing the repute in which he lived. It was competent in showing the nature of the acts proven, though not of itself sufficient to convict. Such is the rule of law applied in Utah, where most cohabitation cases have been tried, and also in Idaho. The bill of exceptions does not purport to bring up the evidence, except of the identical witnesses to whom the question of repute was put; and, because each of those witnesses did not from his

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Points decided.

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own knowledge testify to sufficient (as is claimed) facts of social intercourse, the nature of which facts were in question, and however fully such facts may have been proven by other witnesses, the contention is that such evidence of repute was improper. The point made is practically that under no conditions is such evidence admissible.

Again, it must be said the offense charged is not bigamy or polygamy, and a marriage in fact was not in issue. But, the fact of having a legal wife still living being admitted, the only question to which this evidence was directed was as to whether the defendant was also living in repute of marriage with Rhoda Dimmick. For the purpose of qualifying those acts of defendant, and showing the repute in which he was living, such evidence is competent. (1 Greenleaf on Evidence, secs. 101, 103, 107; *Pettengill v. McGregor*, 12 N. H. 179; *Tarpley v Poage*, 2 Tex. 139-149; 1 Bishop on Marriage and Divorce, secs. 438-440.) But to enforce this objection the counsel contends that the facts known to each witness must at least be sufficient to call for such qualifying evidence. This distinction between those identical witnesses and other witnesses in the case is not well taken. All the facts proven must be taken together. (*Scott v. Lloyd*, 9 Pet. 460; *Reenan v. Hayden*, 39 Wis. 558-561.) The order denying a new trial should be affirmed.

Order reversed.

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(March 18, 1889.)

SCHULTZ ET AL. v. KEELER ET AL.

[21 Pac. 418.]

**MINING CLAIM—LOCATION BY AGENT.**—Where the complaint alleges that a mining claim was located on behalf of the owner by duly authorized agents, and the answer admits that fact, it is error for the court to refuse to give an instruction to the jury to the effect that one might initiate the location of a mining claim through an agent.

(Syllabus by the court.)



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Argument for Respondents.

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**APPEAL from District Court, Shoshone County.**

W. B. Heyburn and W. W. Woods, for Appellants.

The actual possession of another by one who has knowledge of the extent of that possession is such a trespass as will render unlawful any attempt to initiate any such title by such trespass adverse to the title of those in possession. (*Attwood v. Fricot*, 17 Cal. 43, 76 Am. Dec. 567; *English v. Johnson*, 17 Cal. 115, 76 Am. Dec. 574; *Hess v. Winder*, 30 Cal. 355; *Golden Fleece etc. Min. Co. v. Cable Consol. etc. Min. Co.*, 12 Nev. 322; *Belk v. Meagher*, 104 U. S. 284.) If three sides of the claim were marked, and the other side was described in the notice as being a river or the base of a mountain, still, without the marking of the boundaries, the claim would even then be defective. (*Anderson v. Black*, 70 Cal. 226, 11 Pac. 701.)

Albert Allen and Richard Z. Johnson, for Respondents.

If none of the evidence is found in the record, the court will not grant a new trial on the ground that certain instructions to the jury were refused, for the court may have refused to give them because there was an entire lack of evidence on which to base them. (*Brown v. Kentfield*, 50 Cal. 129, 132; *Tompkins v. Maloney*, 32 Cal. 231; *Shepherd v. Jones*, 71 Cal. 224, 16 Pac. 711.) Actual possession, without more, without location, or even an attempted compliance with the mining laws, may be good against mere intruders, but is not good as against one who has complied with the mining laws. (*Garthe v. Hart*, 73 Cal. 543, 15 Pac. 93.) Plaintiffs or their workmen might have been in actual possession, and still have "made no such location as prevented the lands from being in law vacant," and subject to location under the mining laws. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. (*Belk v. Meagher*, 104 U. S. 287.) Prior occupation and working of the mineral lands of the United States, without complying with the requirements of any law, either federal, district, or local custom, does not give a right of possession as against one who afterward peaceably locates a mining claim covering the same ground, and in all respects complies with the federal and district mining laws and

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Opinion of the Court—Logan, J.

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regulations. From the time the second person has perfected his location the prior occupant is a trespasser.

LOGAN, J.—This action is in the nature of ejectment, brought to recover the possession of certain placer mining ground, situated in Shoshone county. The case was tried before the court with a jury. Verdict and judgment in favor of the defendants. The appeal is from the judgment only, but the judgment-roll contains the complaint, answer and bill of exceptions. The complaint alleges that on the eleventh day of June, 1883, the plaintiffs, jointly with one Jesse A. Pritchard, by their attorney, A. J. Pritchard, made a certain mining location in pursuance of the act of Congress of May 10, 1872. The answer admits that the pretended ownership of the mining ground described in the plaintiffs' complaint is based upon a pretended location thereof by one A. J. Pritchard, as the agent of the plaintiffs. Although we have no evidence before us, taken at the trial as to this point, yet we have this allegation of the complaint and the admission by the answer. It was therefore proper for the plaintiffs to request the court to charge that a valid location of a mining claim may be made by a duly authorized agent in the name and in the absence of the principal, and that when such location is once proved it as completely segregates the ground so located from the public domain as though located and held by the locator in person. The fact of the location by an agent was in the case as fully as it would have been had there been evidence. It was absolutely necessary for the plaintiffs, in making out their case, to prove this allegation; and they could only prove it in the manner alleged. The answer having admitted the manner of location, evidence of the manner might not be necessary, but it furnishes no excuse for the court to refuse to instruct upon that subject, because the plaintiffs' whole claim, and the validity of their location, depended upon the question whether it could be made by an agent. It is unnecessary for us to go into the question as to whether this request to charge is proper or not. It was the law of this case, for the reason that the same question had been presented in the same action on a former appeal (ante, p. 333, 13 Pac. 481), and the charge was there held to be proper. In that opinion

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Argument for Appellant.

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we certainly concur. For the refusal of the court to charge as requested, the judgment is reversed, and a new trial ordered.

Weir, C. J., and Berry, J., concur.

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(March 18, 1889.)

LINDENTHAL v. BURKE.

[21 Pac. 419.]

WRIT OF ATTACHMENT—DAY IN COURT—JUDGMENT.—When a debt claimed to be due by one person to another is attached as provided for by section 4309 of the Revised Statutes, and such person has been examined under section 4310 of the Revised Statutes, and the existence of liability denied, the court or judge has no power to order a judgment against such alleged debtor upon such examination.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County.

W. B. Heyburn and W. W. Woods, for Appellant.

The only jurisdiction the court or judge had was to make an order. (*Mull v. Jones*, 33 Kan. 112, 5 Pac. 390; *Board v. Scoville*, 13 Kan. 17.) The order, if made with jurisdiction to make it, would be only an assignment of the claim from the debtor to the creditor. (*Railroad Co. v. Hopkins*, 94 U. S. 12; *Bank v. Pugsley*, 47 N. Y. 368.) On proceedings supplementary to the execution, if the debt is denied, all the court or judge can do is to authorize by order the judgment creditor to bring his action. (Rev. Stats., sec. 4510.) The person sought to be charged as a debtor of the defendant in attachment must owe the defendant upon a demand which would be a cause of action in favor of the defendant against the attached debtor, upon which the former could at common law maintain an action of debt or *indebitatus assumpsit*. (*Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Nesbitt v. Ware*, 30 Ala. 68; *Williams v. Gage*, 49 Miss. 777; *Caldwell v. Coates*, 78 Pa. St. 312; *Webster v. Steele*, 75 Ill. 544; *Hoyt v. Swift*, 13 Vt. 129, 37 Am.

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Dec. 586.) It must be a debt not subject to contingencies. (*Roberts v. Drinkard*, 3 Met. (Ky.) 309; *Bishop v. Young*, 17 Wis. 46; *Maduel v. Mousseaux*, 29 La. Ann. 228; *Railroad Co. v. McCullough*, 12 Gratt. 595; *Wood v. Buxton*, 108 Mass. 102; *Cutter v. Perkins*, 47 Me. 557.)

A. E. Mayhew, for Respondent.

The court or judge has jurisdiction to render judgment against the garnishee in cases like the present. (*Johnson v. Carry*, 2 Cal. 33; *Drummagin v. Boucher*, 6 Cal. 16; *Roberts v. Landecker*, 9 Cal. 262.)

LOGAN, J.—It appears that on the twenty-seventh day of July, 1887, the plaintiff commenced an action in the district court in and for the first district of Idaho territory, to recover \$800 upon a promissory note against one Amadis Seymour. A writ of attachment was issued in the action, and on the thirtieth day of July, 1887, Burke, the appellant herein, was attached as a debtor of the defendant. Such proceedings were had in the action that on the twenty-fifth day of October, 1887, judgment was rendered against Amadis Seymour, the defendant, for \$884.21, and forty-nine dollars and fifty-five cents costs. On the twenty-second day of November, 1887, the plaintiff filed an affidavit in the action stating that the defendant Burke had been attached as a debtor of the defendant Seymour, whereupon the court made an order requiring the defendant Burke to appear and answer touching any debts due by him to the defendant Seymour. The defendant Burke appeared, and the testimony upon the examination seems to have been somewhat conflicting. Upon the testimony so taken the court below ordered judgment in favor of the plaintiff and against defendant Burke for the sum of \$933.76 and for twenty-six dollars and fifteen cents costs. It is contended here that the court below had no jurisdiction to try the question of indebtedness as between Burke and Seymour in that summary manner, and to render a judgment against Burke as a garnisheed defendant. Unquestionably the court had the power to direct the defendant Burke to submit to an examination in respect to the indebtedness, but had no power or authority con-

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Points decided.

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ferred upon him by statute in that manner to direct the entry of judgment against the defendant Burke, without allowing to said defendant a hearing upon issues duly raised. (*Bank v. Pugsley*, 47 N. Y. 368.) Section 4510 of the Revised Statutes provides a clear and distinct manner of proceeding in such cases. The court or judge might authorize the plaintiff, by order, if it seemed to him proper, upon the testimony, to commence an action against the defendant Burke, and in the meantime could have restrained the defendant from transferring or in any manner disposing of the interest of defendant until the action so ordered should be disposed of. The defendant Burke should not have been subjected to any different or harsher remedy than he would have been if he had failed to pay his indebtedness to Seymour. He was entitled to a trial of the issues between himself and Seymour, and the court had no power to deprive him of such trial. The judgment, therefore, in favor of the plaintiff in this action, and against defendant Burke, should be reversed, and the plaintiff left to his proceeding under the statute. Judgment reversed.

Weir, C. J., and Berry, J., concur.

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(March 18, 1889.)

## TERRITORY v. ANDERSON.

[21 Pac. 417.]

**PERJURY—SUFFICIENCY OF INDICTMENT.**—Where an indictment states the defendant on his oath "falsely, wickedly, and feloniously did say, swear, etc.," is sufficient where a person is charged with the crime of perjury.

**ELECTION OATH—REGISTRAR CAN ADMINISTER.**—Under the election law, sections 504 and 505 of the Revised Statutes, power is conferred upon the registrar to administer the election oath.

APPEAL from District Court, Bingham County.

J. H. Hawley and J. Ed. Smith, for Appellant.

Richard Z. Johnson and Henry Z. Johnson, for the Territory.

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Opinion of the Court—Logan, J.

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Every objection that the defendant can waive is waived by failure to move in arrest of judgment, specially stating and pointing out the basis of the motion. (*People v. Dick*, 37 Cal. 277; *Cannon v. United States*, 116 U. S. 77, 6 Sup. Ct. Rep. 278.) The oath need not be taken in a judicial proceeding, but may be before any competent tribunal, officer or person in any case in which it may by law be administered; nor does it matter whether the deposition or affidavit is written and signed before or after the oath is administered. (*People v. Kelly*, 59 Cal. 372; *Ex parte Carpenter*, 64 Cal. 267, 30 Pac. 816.) The registrar was competent to administer the oath. (Rev. Stats., secs. 504, 505.) An averment of "knowingly" is not necessary, except in cases where the assignment of perjury is upon the statement by the accused of his belief, or denial of his belief, of the alleged false matter. (*State v. Raymond*, 20 Iowa, 583; 3 Wharton's Criminal Law, 2261; 1 Barbour on Criminal Law, 200; 2 Chitty on Criminal Law, 312; 3 Russell on Crimes, 70.) "Knowingly" is not essential when "falsely," "willfully," and "corruptly" are used. (2 Wharton's Precedents of Indictments, p. 8, note, citing *State v. Sleeper*, 37 Vt. 122.) It is sufficient to charge generally that the false oath was material. (3 Wharton's Criminal Law, sec. 2263; 2 Wharton's Precedents of indictments, pp. 7, 8, note.)

LOGAN, J.—The defendant was indicted, tried, and convicted at the October term, 1888, of the district court of the third judicial district of Idaho, in and for Bingham county, of the crime of perjury. The crime was alleged to have been committed by reason of the defendant having taken an oath known as the "election oath" before one A. M. Carter, registrar of Rexburg precinct in said county, on September 15, 1888. The defendant contends that the indictment does not charge the commission of any offense by him, for the reason that A. M. Carter was not authorized by statute to administer the oath complained of, and that it is not charged in the indictment that the defendant "knowingly" took such oath. Other points are raised by the defendant in his brief in regard to the charge of the court, and in regard to the refusal of the court to admit certain evidence which was offered by the defendant. These we

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cannot take notice of. No exception was taken to the charge of the court, and no requests were made to the court by the defendant to charge in his own behalf. The exception taken to the refusal of the court to admit certain testimony was not error. We have no bill of exceptions before us, and no evidence. The testimony was objected to as immaterial, and we have no means of ascertaining whether it was immaterial or not. In regard to the points raised as against the indictment, we think the registrar was competent to administer the oath. While it is true that under the general act, which empowers certain persons to administer an oath, the name of the registrar is omitted, yet, under sections 504 and 505 of the Revised Statutes of Idaho, it is perfectly clear that the legislature intended to, and in fact did, by these sections, confer upon the registrar the power to administer such an oath. In regard to the omission of the word "knowingly" in the indictment, we are perfectly clear that the use of the words "willfully, unlawfully, and feloniously contriving and intending to procure himself to be registered, . . . upon his oath aforesaid falsely, wickedly, and feloniously did say, swear," etc., is sufficient in a case of this kind. The defendant was called upon to take oath as to certain facts which were necessarily within his own knowledge, facts which pertained to himself alone, and which he was bound to know; and we do not see how he could in any manner be injured by the omission of the word. Section 8236 of the Penal Code of Idaho provides: "Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." For the defendant to make the claim he does would seem to us to be of no force whatever. The judgment of conviction is therefore affirmed. Judgment affirmed.

Weir, C. J., and Berry, J., concur.

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Argument for Respondent.

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(March 18, 1889.)

## CATRIL v. UNION PACIFIC RAILWAY COMPANY.

[21 Pac. 416.]

CONSTITUTIONALITY OF ACT—DUE PROCESS OF LAW.—An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when under the general law of the land no one else is so liable under such circumstances, does not provide the "due process of law" provided for in the constitution of the United States, and is therefore void.

(Syllabus by the court.)

## APPEAL from District Court, Oneida County.

P. L. Williams, for Appellant.

The different killings constitute different torts, and, while they may be united in the same complaint, they must be set forth, as they are, in fact, distinct causes of action. (Rev. Stats., sec. 4169; *Buckingham v. Waters*, 14 Cal. 146; *Watson v. Railroad Co.*, 41 Cal. 17.) Revised Statutes, section 2680, if valid, creates an absolute liability on the part of any railroad company for all domestic animals killed or injured by it in the manner designated, unless the injury occurred through the neglect or fault of the owner. The effect of this statute, if it means what it says, is to take the property of one, while in the exercise of a lawful pursuit, and in a lawful, proper, and careful manner, and transfer it to another. This is not due process of law, is unconstitutional, and void. (Cooley's Constitutional Limitations, 432 et seq.; *Zeigler v. Railroad Co.*, 58 Ala. 594; *Railroad Co. v. Geiger*, 29 Am. & Eng. R. R. Cas. 275; *Ohio etc. Ry. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259.)

Smith &amp; Smith, for Respondent.

Everyone must so use his property as to cause the least injury possible to every other person's property, and the state may, by appropriate legislation, enforce this duty, even to imposing suitable penalties for its violation. (Broom's Legal Maxims, 275, 276.) Statutes of the kind under consideration are upheld on



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two grounds. One is that the owner of the animals, not being in fault, ought to be compensated; and the other and more weighty one is that it is unsafe to passengers and employees to allow cattle to run upon the track, and be killed by the engines. Hence, to prevent the liability of this killing, a penalty is imposed for every killing. (Cooley's Constitutional Limitations, 715; *Railroad Co. v. Hughes*, 68 Tex. 290, 4 S. W. 492; *Railway Co. v. Mower*, 16 Kan. 573; *Hopkins v. Railway Co.*, 18 Kan. 462.)

LOGAN, J.—This action was brought by the respondent under the statute of this territory to recover damages for certain horses alleged to have been killed by the locomotive and cars of the appellant. The appellant demurred to the complaint, which demurrer was overruled, whereupon the appellant interposed an answer, admitting the incorporation of the defendant, but placing in issue the remaining facts set out in the complaint. Upon the trial of the issues the plaintiff proved the killing of the horses alleged to have been killed, their value, and rested. At the conclusion of the trial the defendant requested the court to charge the jury as follows: "The court charges you that though you may believe that the defendant killed each of the horses sued for by running its engine and cars over against the same, yet, if you further believe by a preponderance of evidence that the defendant, by its agents, in killing any of plaintiff's horses, acted as an ordinarily prudent and reliable person would under similar circumstances, then the plaintiff is not entitled to recover for the horses so killed, and your verdict as to such horses should be for the defendant; that mere proof of killing plaintiff's horses is not sufficient evidence to show that defendant did not act as an ordinarily prudent and reasonable person would act under similar circumstances." The defendant's counsel excepted to the refusal of the court to charge as requested, and this exception raises the only important question of this case, and that is the constitutionality of the statute under which the suit is brought and sought to be maintained; for the refusal to so charge cannot be upheld except upon the statute. The statute (section 2680 of the Revised Statutes of Idaho) provides that "every railroad company operating any line of railroad within Idaho, Vol. 2—37

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this territory, that maims or kills any horse, mare, gelding, filly, jack, jenny, or mule, or any cow, heifer, bull, ox, steer or calf, or any other domestic animal, by running any engine or cars over or against any such animal, is liable to the owner of such animal for the damages sustained by such owner by reason thereof, unless the injury occurred through the neglect or fault of the owner." The plaintiff's counsel concedes that if this section is unconstitutional, then he is not entitled to recover in this action. It is equally clear that unless this action is based entirely upon the statute, the refusal of the court to charge as requested was error; so that the only question to be determined in this case is one of the constitutionality of the section referred to. This statute makes the defendant liable in cases where the mere killing is proven without proof of any negligence whatever on the part of the railroad company. In fact, the killing being proved or admitted, negligence is presumed. It is conceded that there is no general statute in this territory which requires railroad companies to fence their tracks. The supreme court of the United States, in a recent case, has decided that the law compelling railroads to fence their land is not unconstitutional, holding that it is a police regulation. Bearing this doctrine in mind, we find that the authorities which have maintained that acts of this kind are constitutional are based upon the ground that a failure to fence on the part of the railroad company is a violation of the statute, and that the damage in such cases is caused by the wrongful act of the defendant. Such statutes merely fix a penalty for the violation of a duty imposed by a valid law of the land. As we have stated, there is no general law in this territory which compels railroads to fence their lands, and in order to hold the provisions of this section constitutional we must uphold the right of the legislature to inflict a penalty upon the defendant who is doing a lawful act in a lawful manner. We do not feel that we should uphold such a statute as this. The weight of authority is decidedly against our doing so. (*Railroad Co. v. Parks*, 32 Ark. 131; *Zeigler v. Railroad Co.*, 58 Ala. 595; *Ohio etc. Ry. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259.) The court said in the last case cited: "On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are

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borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?" An examination of the section will show that no default or negligence of any kind need be established against the railroad company. A penalty—for it is in the nature of a penalty—should not be inflicted upon the defendant by the legislature for doing a lawful act in a lawful manner. In fact it has no power to inflict such penalty. The running of trains by this corporation was lawful, and of great public benefit, and has served more to develop the resources of this western country than any other agency. It is not claimed that the liability attaches for the violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. It is contended that the statute should be construed so that it may establish a rule of *prima facie* evidence of negligence. Such construction of the statute does not seem to us a fair one. The language is plain, and it was clearly the intention of the legislature to make the killing of the animal by the railroad company the only test of its liability. To do this, in our opinion, would be an act of great injustice, and would be a clear violation of the constitution. It is with great reluctance that we pass upon this statute, and we would not do so if it were possible to dispose of this case justly upon any other basis; but the refusal to charge as requested, and the overruling of defendant's demurrer, can be upheld upon no other ground than upon the existence of this statute, for, in the absence of the statute, both rulings are manifestly error. A statute of this character—one precisely similar to the one in question—has lately been passed upon by the supreme court of Montana in the case of *Bielenberg v. Railway Co.*, 8 Mont. 271, 20 Pac. 314. That court has declared such an act unconstitutional. We are inclined to follow the decision of that court. The judgment and order appealed from are therefore reversed, and a new trial granted. Judgment reversed.

Weir, C. J., and Berry, J., concur.

## Argument for Appellant.

(March 19, 1889.)

WASHINGTON & IDAHO RAILROAD CO. v. COEUR  
D'ALENE RAILWAY AND NAVIGATION COM-  
PANY ET AL.

[21 Pac. 562.]

**INJUNCTION—RIGHT OF WAY—ACTION AT LAW.**—Where a railroad prays for a perpetual injunction against another railroad, enjoining the entering upon its right of way and for a decree of title, and it appears at the time of trial the defendant has completed its line of road over the disputed ground and is in the actual occupation and use of the same, held, the court was right in refusing a judgment of perpetual injunction, but should not have passed upon the title, leaving the plaintiff to his action at law.

**APPEAL** from District Court, Shoshone County.

Woods & Heyburn, for Appellant.

Under the system of express findings, nothing is implied, but full findings are required upon every material issue without any request therefor, and with no exception on account of defects; and, if any material issue is left unfound, it is ground for a reversal of judgment. (*Robinson v. Railroad Co.*, 57 Cal. 417; *Everson v. Mayhew*, 57 Cal. 144; *Knight v. Roche*, 56 Cal. 25.) The finding on every material issue is necessary, although no evidence was introduced upon such issue. (*Campbell v. Buckman*, 49 Cal. 362; *Speegle v. Leese*, 51 Cal. 415.) There is no presumption of an implied finding under our practice. (*Railroad Co. v. Reynolds*, 50 Cal. 90; *Campbell v. Buckman*, 49 Cal. 362; *Dowd v. Clarke*, 51 Cal. 263.) There being findings in the record, there is no presumption of the waiving of findings upon any issue. (*People v. Forbes*, 51 Cal. 628; *People v. Fuqua*, 61 Cal. 377; *Van Court v. Winterson*, 61 Cal. 615.) The approval by the Secretary of the Interior of the act of a railroad in locating its line may perfect a grant of absolute title, which cannot be questioned or defeated by any person other than the government itself. (*Shepley v. Cowan*, 91 U. S. 330; *Johnson v. Towsley*, 13 Wall. 72; *Moffat v. United States*, 112 U. S. 32, 5 Sup. Ct. Rep. 10; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836; *Steel v. Refining Co.*, 106 U. S. 450, 1 Sup.

## Argument for Respondents.

Ct. Rep. 389; *Martin v. Mott*, 12 Wheat. 30.) As long as a grant remains uncanceled, it cannot be invaded by a mere trespasser, or one who does not claim to enter by virtue of a better title. (*Aurora Hill Consol. Min. Co. v. Mining Co.*, 34 Fed. 520.) The courts cannot exercise the power of eminent domain either directly or indirectly. The question of the propriety or policy of a condemnation is not a judicial one, but one vested solely in the legislative authority. (Mills on Eminent Domain, sec. 11; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Boston etc. R. Co. v. Salem etc. R. Co.*, 2 Gray, 34, 35.) The right of way of one railroad cannot be taken by another, except it be in a canyon, and then only on showing of actual necessity in suit instituted especially for that purpose. (*Montana Cent. R. Co. v. Helena etc. R. Co.*, 6 Mont. 416, 12 Pac. 916; *Railway Co. v. Alling*, 99 U. S. 463; *Denver etc. Ry. Co. v. Denver etc. R. Co.*, 17 Fed. 867; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *Housatonic R. Co. v. Lee etc. R. Co.*, 118 Mass. 391; *Boston etc. R. Co. v. Lowell etc. R. Co.*, 124 Mass. 368.) When the plats of the plaintiff were approved, the grant attached and was anchored to the definite line indicated upon the plat. (*Schulenberg v. Harriman*, 21 Wall. 60; *Ex parte Railway Co.*, 101 U. S. 713; *Leavenworth etc. R. Co. v. United States*, 92 U. S. 741; *Knevals v. Hyde*, 1 McCrary, 402, 6 Fed. 651; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336; *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; *Railway Co. v. Alling*, 99 U. S. 475.)

Albert Allen and William H. Clagett, for Respondents.

At the time of making the survey over the line in controversy herein the plaintiff had not filed, or attempted to file, in the office of the Secretary of the Interior, its articles of incorporation or proofs of its organization, and did not do so for more than a month after the survey. Hence the survey of plaintiff was, at the time it was made, and ever since has been, and is now, absolutely void, as against the defendant, which has, subsequent to such survey, surveyed and constructed its road over the same. (*Belk v. Meagher*, 104 U. S. 279; *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. 229.)

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Opinion of the Court—Weir, C. J.

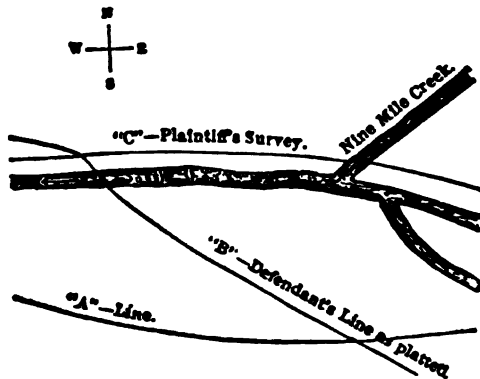
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WEIR, C. J.—This is an appeal from a judgment in favor of the plaintiff against the defendants, in which the plaintiff asks a judgment and decree of this court enjoining the defendant, and all persons claiming under it, from in any manner entering upon the right of way of the plaintiff at the town of Wallace, in the county of Shoshone, extending in length a mile and a half, and in width one hundred feet on each side of the central line of the railroad of plaintiff, as surveyed and designated on the ground, and from further constructing said railroad on said right of way, and from interfering with the plaintiff in the peaceable and exclusive possession and occupancy of said right of way; and that the title be decreed in the plaintiff as against the defendant. It therefore appears that this action is for a final judgment of injunction in favor of the plaintiff and against the defendant. An answer was interposed by the defendant, and upon issues framed the cause came on for trial. A preliminary injunction was granted in this cause, but was subsequently vacated upon motion. It appears from the findings in this case that, at the time of the trial thereof, the defendant had completed its line of road over the disputed ground, and was in the actual use and occupation of the same. The plaintiff, it would seem, had an adequate remedy at law, if its contention is correct, and the court below was right in refusing a judgment of perpetual injunction, as prayed for; but we think that the court should not, in that case, have passed upon the ownership and title of the premises in question, but should have left the plaintiff to his action at law. The judgment of the court below should be modified as we have stated, and, as modified, the same is affirmed, without costs to either party in this court or in the court below.

BERRY, J., Dissenting.—The plaintiff is a company duly created and organized under the laws of Washington territory for the purpose of constructing and operating a railway in Idaho territory, including on its line the premises more especially in question in this action. The defendant is also a company duly organized for a like purpose under the laws of the territory of Montana. Both parties began their survey of this section of their respective roads, as appears by the findings of

## Opinion of the Court—Berry, J., Dissenting.

the court, on the same day (October 22, 1886), and completed their surveys—the plaintiff on the eighth day of December, 1886, and the defendant, on the fifth day of November, 1886. The plats of the respective roads were filed in the United States land office in said district—the defendant's on the eighth day of November, 1886, and the plaintiff's, December 23, 1886—and certified and approved by the commissioner of the interior, February 11, 1887. The plats in each case showed the center line of the route claimed by each, at point on the South Fork of the Coeur d'Alene river. The lines of the roads, as marked on the respective maps, diverge from each other as follows:



The plaintiff's line is marked "C," and the defendant's line is marked "B." The premises in controversy are from the point of crossing of these two lines "C" and "B" eastward up the stream a distance of about one and a half miles. The valley of the South Fork of the Coeur d'Alene river at this place is alleged by the defendant in its answer to be about eighty rods wide. The stream appears to run near the northern boundary of the valley. After the respective plats were duly approved and filed, July 11, 1887, the chief engineer of the defendant, George P. Jones, by a written notice, advised the plaintiff that it was the intention of the defendant to construct its said road "on its location as filed." It is also admitted by the defendant, and is part of the bill of exceptions allowed herein, that August 23, 1887, and before the defendant had begun work on the prem-

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Opinion of the Court—Berry, J., Dissenting.

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ises in question, the plaintiff delivered to the defendant the following notice:

“Engineer’s Camp W. & I. R. R. Co.

“(July 13th), August 23, 1887.

“To George P. Jones, Engineer in charge, Coeur d’Alene Railway & Navigation Co.

“Dear Sir: You, and all parties in your charge, or in the employ of the Coeur d’Alene Railway and Navigation Company, are hereby notified that the Washington and Idaho Railroad Company, a corporation organized under the laws of Washington territory, and authorized to transact business in Idaho territory, has heretofore duly filed complete maps of its branch line from old Mission to Mullan, Idaho, under the act of Congress approved March 3, 1875, entitled ‘An act granting right of way to railroads through the public lands,’ and, having complied with the rules and regulations of the honorable department of the interior, the said maps were duly approved by the said department, and a right of way through the public domain secured by said company. Therefore you, and all servants and employees and privies of the Coeur d’Alene Railway and Navigation Company are warned to desist from occupying any portion whatever of the said Washington and Idaho Railroad Company’s right of way as the same is staked out and surveyed, and as shown by its said maps now on file.

“THE WASHINGTON AND IDAHO RAILROAD  
CO.

“By W. H. BURRYS,  
“Engineer in Charge.”

That, after the interchange of notices, the defendant entered upon the route on plaintiff’s map marked line “C,” and was in process of constructing its road along said line “C” when this action for an injunction was begun.

The main question is as to which of these companies is the owner of this right of way at the place in dispute. Both companies claim it under the act of Congress of March 3, 1875, granting to railroads the right of way through the public lands



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of the United States. Section 1 provides: "The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road." Section 3 authorizes the territorial legislature to provide for the manner in which private lands, and possessory claims on public lands of the United States, may be condemned, etc. Section 4: "Any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands, over which such right of way shall pass, shall be disposed of subject to such right of way; provided, that, if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

This is not a grant to any particular railroad company, but it is an offer to all companies, otherwise entitled, which shall comply with the conditions of the act. When complied with, it is only operative to the extent of one hundred feet on each side of the central line of said road, subject to the conditions that, if after such compliance the road shall not be built within five years, the rights granted shall be forfeited as to such uncompleted parts of said section. The act of location must define the center of the right of way. To every grant of this nature there must be two parties—the grantor and the grantee. The United States is the grantor, and the company claiming is the grantee. When the act has passed Congress, something else remains to be done. The rights granted must be made definite, through the supervision and approval of the department of the interior. That is the plain intent of the act, though the Sec-

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retary of the Interior may not, by any merely captious refusal to approve a location, defeat the objects of the act. It is for the purpose of having the rights not only of applicants under the act defined, but also that ungranted privileges may be known, both to the United States' authorities and to other claimants, that the rules and regulations of the interior department of November 7, 1879, were adopted.

Rule 1, and all of its subdivisions, are merely directory, and as to what evidence the government will require as to the corporate existence of the claimants. Rule 2 prescribes that upon the location of any section of the line of route of its road, not exceeding twenty miles in length, the company must file with the register of the land district in which said section of the road, or greater portion thereof, is located, a map for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands, according to the public surveys. The map must be filed within twelve months after the location of such portion of the road, if located upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof. This, too, is directory, and a condition on which the department will act. Rule 3 prescribes what acts are required before it will consider the location as fixed, as between the claimant and the government, and other claimants from the government. Rule 4: "Should the company desire to construct its road over lands prior to their survey, it must file, in manner as heretofore indicated, a map of its surveyed route, without waiting until the lands are surveyed, and, upon approval thereof, may proceed with construction; but, immediately on survey of the lands over which the road passes, the company must also file a map showing the line of route of its road over such lands, in order that the proper notes and records for the protection of its rights may be made." As this provision was fully and voluntarily acted upon and complied with by both companies in their dealing with the government, by each making a plat showing its line of route, obtaining it to be approved by the Secretary of the Interior, and filing it in the United States land office, perhaps nothing more need be here said of the right of the interior department to make this or any of these rules. Yet its valid-

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ity is drawn in question by the findings of the court below, as being without authority. A grant shall be construed most favorably to the government. In such case the government is deprived of no power by implication. The question of its power to prescribe rules is not so much by what authority does the land department exercise this right, but rather how, if at all, has its exercise been denied. As we have seen, it is proper and necessary that the government shall always be apprised of the limits of an adverse right, or claim of right, and to this end it is proper that its construction of the law, as well as the conditions and limitations of its own acts of consent and approval, should be distinctly known. That, as I understand this rule, is precisely what it does. I do not concur with the court in Oregon in case of *United States v. Chaplin*, 31 Fed. 892, in which rule 4 is held to be without authority and void. It is precisely such apparent abuses of the privileges, under the act of March 3, 1875, as are there alleged (and by the demurrer admitted), which made such precautions on the part of the government necessary. Those rules do not pretend to create rights, nor to deny rights granted by Congress, but in this instance, at least, by exercise of a reserved and commonly exercised right of judgment, to put upon the completed compact the construction of the government. Such construction is the light by which the acts of the department are to be construed and understood. Reference to this right, in the head of the land department, is clearly implied in the act of Congress of March 3, 1875, in requiring acts making certain the claim of companies to be done subject to approval of the Secretary of the Interior. The rule is in the spirit of the law, and I think the court should not have pronounced it void, as for want of authority in the head of the land department to make it; in other words, I think he had such authority.

Rule 5. "Any variation within the limits of one hundred feet from the center line of the road, as located, will not be construed as a deviation from such line; but where, upon construction, it is found necessary to transgress such limits, in which the company has right of way, the company must at once file an amended map of right of way for approval." It is enough to say that a plat fixing the location of each line was

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necessary, under the act and rules; that in view of that necessity, and for the express purpose of complying with the act, and also with such rules, a plat was made by each company, presented to the Secretary of the Interior for his approval, and by him accepted and approved, and filed by the company in the office of the register of the proper United States land office. These plats were so made, approved, and filed for the express purpose of fixing the respective lines, and such lines were thereby fixed, and made definite and certain. There can, I think, be no question of that. By rule 5, the government declared that one condition of its approval was that each party should be confined within one hundred feet of the center line so drawn. Both parties, and also the government, acted in view of the same statute and rules of the department. The plat of the plaintiff, being subsequent to that of the defendant, was rightfully made to cover the route which the defendant did not follow or touch; and such line, followed and appropriated by the plaintiff, is the identical line here in question. The plaintiff's selection was confirmed to it by the Secretary of the Interior, and the plaintiff became and was the owner of the right of way marked on the several plats line "C." But defendant avers that its line as platted and approved was made, by its own mistake, to cover the wrong line, and that it really meant to take the line covered by the plaintiff's route; that it surveyed three lines—one marked on the plat appended to its answer, and corresponding with the foregoing plat, as line "A," running south of the line in controversy about eight hundred feet; one marked on said plats line "B," and south of the plaintiff's line about five hundred feet; and one marked "C," which was the same as that selected by the plaintiff; and that by mistake of its engineer or maker of the plat line "B" was chosen instead of line "C"; and claims the right to correct its location, by changing its route from "B" to "C." There is no allegation or pretense that the plaintiff had anything to do with the defendant's plat, or with its selection or claim of lines, or that the land department ever had any information on the subject. Neither was the United States, or any officer of the United States, a party to this action, except that involved in its approval by the Secretary of the Interior; nor has there been any attempt to amend the defendant's

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map of location. "No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them." (*Schulenberg v. Harriman*, 21 Wall. 62.)

Granting that the defendant did not in fact locate on the line which it meant to locate upon, still, under the laws of Congress, the rules of the department, on which all parties acted, the rights so acquired by the plaintiff cannot be thus set aside. Its rights were no longer inchoate, but had become fixed and vested, and could not be divested but by its own act, or by lapse of time. To do so would be merely to take the plaintiff's property without compensation. Were this a canyon or pass, where it were necessary that both roads should run over the same ground, there are provisions under which both roads might be permitted to occupy it. But this is not such a case, nor have those means been attempted. Yet the court below adjudged that line "C" was the true line of the defendant, and that the right of way over the line in question belonged exclusively to the defendant. This was error. But defendant still insists that, granting the right of way to be in the plaintiff, still the plaintiff was guilty of laches in not apprising the defendant of its claim before the work was done, and that, therefore, the plaintiff is estopped. The court below so holds. We think the court in this was also in error. From the situation of the case an estoppel does not arise. The defendant is presumed to know its own route; having itself surveyed the middle route, made its own plat, and procured that plat to be approved and filed in the United States land office, as a notice to all others. But had it been made by another, if the defendant did not know what it contained, it might have known it by very slight diligence. Again, the plat was a public record in the land office, in the vicinity of this work; and it is hardly conceivable that the defendant should not have referred to its own plat in so important a matter as building a railroad. But it appears that before any part of this work on the disputed line was performed, and on the eleventh day of July, the defendant's chief engineer served upon the plaintiff a notice that the defendant proposed to proceed with the construction of its road according to its own plat; to which the plaintiff replied, referring to the plaintiff's maps,

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Points decided.

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and warning the defendant "to desist from occupying any part of the plaintiff's line, as the same is staked out and surveyed, and as shown by its maps now on file." This, with the facts above mentioned, was certainly sufficient to call attention to the record of the location, and to repel any presumption of laches on the part of the plaintiff from mere silence or inaction. The plaintiff is not estopped in such case from asserting its claim to its own right of way.

There are other errors assigned, but, from the view I take of the foregoing, it is unnecessary to review them. It is claimed by a majority of the court that this judgment may be modified so as to avoid the error in the rulings, findings, and judgment in the court below; by denying the injunction prayed for; and leaving all questions of the right of the plaintiff to the ownership of the right of way to be determined in another action. But that cannot be done. This court has jurisdiction of the action for that purpose with the others, and the plaintiff demands an adjudication of its rights in this action. It is not competent for the court to deny such determination, nor was the case tried with such end in view. The judgment in the court below should be reversed and the case remanded.

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(July 22, 1889.)

## WOOLEY v. WATKINS.

[22 Pac. 102.]

**CRIMINAL ORGANIZATION.**—Orders, organizations, associations, or by whatever name called, which teach, advise, counsel, encourage, or practice the commission of crimes forbidden by law, are criminal organizations.

**OVERT ACTS OF MEMBERS.**—To become and continue to be members of such organizations are such overt acts of recognition and participation as make them *particeps criminis*, and as guilty in contemplation of law as though they actively engaged in promoting their unlawful objects and purposes.

**ORGANIZATION OF TERRITORY—POWER CONFERRED.**—The organic act confers concurrent power upon the territorial assembly of Idaho, to prescribe the qualifications and disabilities of voters of the territory, and to provide a mode by which those qualifications may be ascertained.

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Statements of Facts.

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**ACT OF CONGRESS—QUALIFICATIONS OF ELECTORS.**—The act of Congress of March 22, 1882, touching the qualifications of electors in the territories, does not repeal sections 1851 and 1860 of the organic acts, which give the territorial legislature power to prescribe the qualifications of electors of the territory.

**TERRITORIAL STATUTE NOT REPUGNANT TO CONSTITUTION OF UNITED STATES.**—The territorial statute of February 3, 1885, which prescribes the qualifications of voters of the territory and provides that those qualifications may be ascertained by the oath of the electors, is not repugnant to the constitution of the United States. (*Innis v. Bolton*, ante, p. 442, 17 Pac. 264, affirmed.).  
(Syllabus by the court.)

**APPEAL from District Court, Bingham County.**

This is an appeal by H. S. Wooley from a judgment rendered against him on the sixteenth day of October, 1888, in Bingham county, by the district court of the third judicial district of the territory of Idaho, dismissing his complaint and application for a writ of *mandamus* against C. N. Watkins, registrar of voters in Paris precinct, Bear Lake county, to compel him to register his name in the list of voters of that precinct. On the fifth day of October, 1888, the relator filed his petition, wherein he avers "that he is a male inhabitant and native-born citizen of the United States, over the age of twenty-one years; that he has resided in Bear Lake county, territory of Idaho, for ten years last past, and still resides there; that he is entitled to vote at any election for delegate to Congress, and for territorial, county, and precinct officers in said territory; that he is not under guardianship, *non compos mentis*, or insane; that he has not been convicted of treason, felony, or bribery in this territory, nor in any other territory or state in the Union; that he is not a bigamist or polygamist; that he does not teach, advise, counsel, or encourage any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as 'plural' or 'celestial' marriage; that he is not a member of any order, organization, or association which teaches, advises, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of any order, organization, or association, or otherwise; that C. N. Watkins is, and at all times herein mentioned has been, the duly

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Statement of Facts.

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appointed and acting registrar of Paris precinct, Bear Lake county, Idaho territory; that on the twenty-ninth day of September, 1888, between the hours of 9 o'clock A. M., and 5 o'clock P. M. (that being the time designated by said registrar for that purpose), he appeared before the said registrar at the place appointed by him for the registration of voters, and then and there offered to take and subscribe the oath prescribed by law, and known as the 'elector's oath,' answer all questions, give all the information under his control, take all the oaths, and do all other acts and things required of him by law, and then and there demanded of said registrar to register his name as a voter, as required by law; that the said registrar, in violation of his duty, rejected his name, and refused to enter it upon the election register, as required by law; that he has been for more than ten years continuously a resident of the said Paris precinct, and entitled to registration therein, and that his name has not been entered upon the election register in said precinct or elsewhere; and prays that a writ of *mandamus* may be issued, directed to the said C. N. Watkins, registrar as aforesaid, commanding him to register his name in the manner prescribed by law."

Upon the presentation of this petition the court granted an alternative writ of *mandamus*, directed to the said respondent, returnable on the tenth day of October, 1888. On the return-day of the writ the respondent filed an answer admitting certain facts alleged in the petition, and denying others, as follows: "The defendant admits all the facts set forth in the petition, except that it is denied that he is an elector of the territory of Idaho, for the following reasons, and none others; That the said petitioner is a member of what is known as the 'Mormon church in Idaho,' which organization teaches, advises, counsels and encourages its members to commit the crime of polygamy, and other crimes defined by law, as a duty arising or resulting from membership in such organization, and which practices bigamy or polygamy as a doctrinal rite of such organization." On the aforesaid return-day one H. M. Bennett filed his petition, praying the court to allow him to intervene on behalf of the public or people of the territory in said proceeding, and to become a codefendant, for the reasons stated in his petition, which are as follows: "That said action is prosecuted for the purpose of



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Statement of Facts.

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procuring a judgment of this court upon certain questions in which said petitioner is deeply interested; that his interest in said questions is adverse to the interests, desires, and wishes of both plaintiff and defendant; that the issue therein is only colorable; that said action is collusively brought and prosecuted; that the defendant did the acts complained of by and with the advice and procurement of the agents and leaders of the Mormon church; that the counsel for the plaintiff, and those interested with him, have either prepared or advised the preparation of the pleadings; that by the laws of this territory every member of an organization that practices or encourages the practice of crime among its members, or other persons, is ineligible to register, vote, or hold office; that within this territory there are many members of what is known as the 'Mormon church'; that it is an organization that, among other things, encourages the practice of bigamy among its members; that the plaintiff and defendant, and their attorneys, are members of the said Mormon church; that plaintiff's attorneys are not employed by plaintiff, but are retained and employed by the agents and representatives of the said Mormon church; that this action is collusively brought to procure a judgment of this court that will aid the leaders of said church in securing the registration of its members in violation of law; that said action is brought in such way that the agents, leaders, and representatives of said church may control both the prosecution and defense, and thereby prevent the examination and cross-examination of witnesses and parties further than they desire; that the Mormon church, acting through its agents and leaders, has controlled and directed every step in this matter on both sides, from the inception to the present time, and intend to continue such control; that defendant, before refusing to register the plaintiff, registered a large number of Mormons upon the same showing made by the plaintiff, and that he would have registered the plaintiff in like manner if he had not been by those interested with the plaintiff influenced not to do so, in order to bring this matter into court for the purpose hereinbefore stated." Upon the presentation and filing of this petition, and by the consent of the relator and respondent, H. M. Bennett, the petitioner, was by order of the court permitted to become a party respondent, and to show cause, if any there were, why the writ of *man-*

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Argument for Appellant.

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*damus* prayed for by the relator should not be issued. In pursuance of this order the said Bennett filed an answer on the same day, wherein he denies the relator's right to the relief prayed for on two grounds: "1. That the relator is not a qualified elector of Bear Lake county, Idaho, or of any county of this territory; and 2. That he is a member of what is known as the 'Church of Jesus Christ of Latter Day Saints,' commonly called the 'Mormon church'; that said church is an organization which teaches, advises, counsels and encourages its members to commit the crime of bigamy, polygamy, and other crimes defined by law, as a duty arising or resulting from membership in that organization, and that practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization, and prays that the proceedings be dismissed," etc. The case was tried by the court below without a jury, upon the issues made by the aforesaid pleadings, and upon the evidence introduced by the relator and respondents respectively. Upon the issues and proofs so made and given the learned judge who presided at the trial, upon his findings of fact and conclusions of law, denied the writ, and entered judgment against the relator, with costs. From this judgment the relator appealed, and brings the record here for review.

Sheeks & Rawlins, for Appellant.

A person who withdraws from a church does not continue a member of it simply because he holds the same religious faith and tenets with the members of that church. (2 *Wait's Actions and Defenses*, 257; *Lucas v. Case*, 9 Bush, 297; *Groesbeeck v. Dunscomb*, 41 How. Pr. 302; *Den v. Bolton*, 12 N. J. L. 206; *Bouldin v. Alexander*, 15 Wall. 131.) The statute, being so construed as to disfranchise a person for past conduct or relations, and by requiring him, as a condition of the right to vote or hold any office, to establish his innocence of such past conduct or relation by means of an expurgatory test oath, is clearly in violation of the provisions of the constitution forbidding bills of attainder and *ex post facto* laws, and that no person shall be required to be a witness against himself. (*Cummings v. State of Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Pierce v. Carskadon*, 16 Wall. 234, 239.) If a person is to be disfranchised because

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guilty of some past conduct or relation, his guilt must be first judicially ascertained. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law. (*Minor v. Happersett*, 21 Wall. 176; *Huber v. Reily*, 53 Pa. St. 112; *Goetcheus v. Matthewson*, 61 N. Y. 420; *Green v. Shumway*, 39 N. Y. 418.)

R. Z. Johnson, Attorney General, and Smith & Smith, for Respondents.

The right of suffrage is purely conventional, and is granted or withheld according to the legislative will. (*Anderson v. Baker*, Bright. Elect. Cas. 27.) A test oath may be prescribed to be taken in order to ascertain if the party offering to register or vote possesses the qualifications prescribed by law to entitle him to vote. (*Blair v. Ridgely*, Bright. Elect. Cas. 83; *Innis v. Bolton*, ante, p. 442, 17 Pac. 264.) Society must possess this power as a means of self-preservation, and it may disfranchise persons, or prevent them from holding office, on account of the belief they may entertain upon a given subject. (*Clawson v. United States*, 114 U. S. 447, 5 Sup. Ct. Rep. 949.) - This statute does not violate the first amendment to the constitution. It is in the power of the legislature to prohibit criminal practice, even if performed in the name of religion, by imposing penalties or disabilities. (*Reynolds' Case*, 98 U. S. 145; *Cooley on Torts*, 33.)

WEIR, C. J. (After Stating the Facts.)—The argument of this case at bar took a wide range, but the real questions involved lie in a narrow compass. They may be briefly stated in the following order: 1. Was the relator, at the time he demanded and was refused registration, a member of any order, organization, or association, and, if so, does that order, organization, or association teach, advise, counsel or encourage its members, devotees or other persons to commit the crime of bigamy or polygamy, or any other crime forbidden by law, as a duty arising from membership in such order, organization, or association? 2. Has the territorial legislature the power to legislate upon the subject of the elective franchise, and prescribe the qualifications of voters of the territory, and to declare

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by statute that these qualifications shall be verified by the oath of the elector? 3. If so, did that legislative body exceed its power and infringe upon any of the provisions of the constitution of the United States in the exercise of that power?

The relator and respondents disposed of one of the questions of fact involved in the first proposition by a stipulation in writing, which was given in evidence upon the trial below. This stipulation is expressed in these words: "In this cause the following facts are agreed to: That the plaintiff is a native-born citizen of the United States, over twenty-one years of age, and has resided in Bear Lake county and Paris precinct for ten years; that he is not under guardianship, *non compos mentis*, or insane, and that he has never been convicted of felony, bribery, or treason; that he is not a bigamist or polygamist; that he does not teach, advise, counsel or encourage persons to commit the crime of bigamy or polygamy, or any other crime defined by law, or to enter into the relation known as the 'plural' or 'celestial' marriage, unless he does so by the bare fact that he is a member of the Mormon church; that he is a member of what is known as the 'Utah,' or regular, branch of the Mormon church, as distinguished from the reorganized, or 'Josephite,' branch of said church." By this agreement the fact is admitted that the relator was, at the time he applied for and was refused registration, a member of an order, or organization, or association, known as the "Utah," or regular, branch of the Mormon church. And the learned judge before whom the case was tried found from the evidence before him the fact that the order, organization, or association known as the "Utah," or regular, branch of the Mormon church, of which the relator, by the agreement above recited, admits that he is a member, teaches, advises, counsels and encourages its members, devotees and others to commit the crime of bigamy or polygamy, as a duty arising or resulting from membership in said order, organization, or association. From a careful review of the evidence recited by the judge in his findings we think it is amply sufficient to sustain his conclusions of fact on this point.

The consideration of the second proposition requires an examination of the scope of the legislative power given by Congress to the legislative assembly of the territory of Idaho. This

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power is embraced in the organic act, and is to be found in sections 1851 and 1860 of the Revised Statutes of the United States. Section 1851 provides that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the laws and constitution of the United States." Section 1860 declares that "at all subsequent elections, however, in any territory hereafter organized by Congress, as well as at all elections in territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assembly of each territory, subject, nevertheless, to the following restrictions, . . . namely: 1. The right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and by those above that age who have declared on oath, before a competent court of record, their intention to become such, and have taken an oath to support the constitution and government of the United States. 2. There shall be no denial of the elective franchise, or of holding office, to a citizen on account of race, color, or previous condition of servitude. 3. No officer, soldier, seaman, mariner, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote in any territory by reason of being on service therein, unless such territory is, and has been for the period of six months, his permanent domicile. 4. No person belonging to the army or navy shall be elected to or hold any civil office or appointment in any territory," except officers of the army on the retired list. That these sections of the organic act confer upon the territorial assembly of Idaho the power to legislate upon the question of suffrage, and to prescribe the qualifications of voters in the territory, subject to the conditions and restrictions contained in said act, is, we think, very plain; too plain, indeed, to admit of argument. But it is contended by the learned counsel for the appellant that, if they do confer such power, Congress afterward, by the act of March 22, 1882, having assumed to legislate upon the same subject, thereby withdrew or revoked that power, and that the territorial statute in question, having been passed after that withdrawal or revocation, is void for want of authority in the territorial assembly to pass it. This theory of interpretation is, in effect,

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that Congress, by the act referred to, repealed those provisions of the organic act above recited, which confer power upon the territorial legislature to prescribe the qualifications and disabilities of voters of the territory. This view may commend itself for ingenuity, but cannot be recognized as sound. It is not a correct construction of the statutes referred to. If Congress intended that act to have any such effect, it would have so declared by express terms, and would not have left its intention to inference. Repeal by inference or implication is not favored in the law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. (*Board v. Coal Co.*, 93 U. S. 619; *Movius v. Arthur*, 95 U. S. 144; *Arthur v. Homer*, 96 U. S. 137; *Chew Heong v. United States*, 112 U. S. 536, 5 Sup. Ct. Rep. 255.) A careful reading and comparison of the provisions of the act of Congress of March 22, 1882, and those of the act of the territorial assembly of February 3, 1885, which bear upon this subject, fail to develop such a clear and irreconcilable conflict between them as brings them within the rule above stated; but, on the contrary, plainly shows that the power conferred by Congress upon the territorial assembly to prescribe the qualifications and disabilities of voters in the territory is not absolute, and exclusive of the power of Congress to legislate upon the same subject, but is concurrent, and must be exercised subject to the constitutional limitations and restrictions imposed by Congress in the organic act.

The question involved in the third proposition is more difficult, and its solution requires careful thought. It is contended that those parts of the act of the territorial legislature which prescribe the qualifications of electors of the territory, and which require those qualifications to be verified by the oath of the elector, are in conflict with those provisions of the constitution of the United States which declare (1) that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; (2) that no religious test shall be required as a qualification to any office of trust under the United States; (3) that no bill of attainder or *ex post facto* law shall be passed; and (4) that no person shall be deprived of life, liberty, or property without due process of law. Those parts

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of the territorial statute objected to as obnoxious to these provisions read as follows: "No person who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as 'plural' or 'celestial' marriage, or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory." (Rev. Stats. 1887, sec. 501.) That part of the oath which the elector is required to take to verify that he is not within the scope of any of these disabilities is as follows: "I do swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy, or plural or celestial marriage, as a doctrinal rite of such organization; that I do not, and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty, or otherwise; that I do regard the constitution of the United States, and the laws thereof, and of this territory, as interpreted by the courts as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding."

More than three-quarters of a century ago that great lawyer and eminent jurist, Chief Justice Marshall, announced a rule of interpretation in cases involving alleged conflicts between statutes and constitutions, which has ever since commanded the highest respect of courts of justice. In *Fletcher v. Peck*, 6 Cranch, 87, he said: "The question whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in

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the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." And more than fifty years ago Chief Justice Shaw, in considering this question in the *Wellington Case*, 16 Pick. 95, 26 Am. Dec. 631, used similar, if not stronger, language. In that case he declared that "the delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond reasonable doubt." Again, Mr. Justice Washington, in rendering the opinion of the court in *Ogden v. Saunders*, 12 Wheat. 213, which involved a like question, said: "If I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." This rule has been recognized and followed ever since by all the courts of last resort, state and federal, in the United States, in cases where they have been called upon to decide questions of this kind.

It will be observed, by a careful examination, that the law objected to as being repugnant to the first two provisions of the constitution above recited is not directed against the entertaining and free exercise of religious opinions and religious beliefs, but



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is expressly aimed against such overt acts as violate the law in putting those opinions and beliefs into practice. While Congress, and, consequently, the territorial assembly, are deprived of all legislative power over mere opinion, they are left free to reach actions which are of a criminal nature, and are in violation of social duties, and subversive of good order. This distinction is stated with great clearness by the supreme court of the United States in the *Reynolds Case*, 98 U. S. 166, Chief Justice Waite, in delivering the opinion of the court, in a few appropriate and well-chosen illustrations demonstrated the distinction with great force. He there said that "laws are made for the government of actions, and, while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society, under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." This reasoning and these illustrations apply with as much appropriateness and force to the case in hand as they do to the one cited, and we do not think it necessary to extend the length of this opinion by further discussion to establish the soundness of the distinction pointed out. Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and continue to be members of such organizations or associations are such overt acts of recognition and participation as make them *particeps criminis*, and as guilty, in contemplation of criminal law, as though they actually engaged in furthering their unlawful objects and purposes.

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To demonstrate the unsoundness of the position so earnestly urged by the appellant's counsel—namely, that the statute in question is in conflict with that provision of the federal constitution which declares against the passage of *ex post facto* laws, it is only necessary to compare the terms of the statute with what the courts have so often defined this provision to mean. They have decided time and again that an *ex post facto* law, within the meaning of this clause, is "one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage." (1 Kent's Commentaries, 409; *Cummings v. State of Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Fletcher v. Peck*, 6 Cranch, 97; Sedgwick's Statutory and Constitutional Law, 2d ed., 558; *Pierce v. Carskadon*, 16 Wall. 234.) By a careful reading of the law objected to it will be observed that it treats of the present and future, and not of the past. Its operation is entirely present and prospective, and does not come within the scope of the above definition, and is in no sense *ex post facto*. It does not possess any of the features or characteristics of such a law. A law which simply prescribes the qualifications of voters and provides a mode of ascertaining those qualifications, does not, in our view, conflict with this clause of the constitution. "A state having the sovereign power to prescribe the qualifications of its electors may impose a test oath to be taken by every voter at the poll. This in no way violates the constitution of the United States." (*Blair v. Ridgley*, 41 Mo. 63, 97 Am. Dec. 248, and note; *Innis v. Bolton*, ante, p. 442, 17 Pac. 264.) It is also insisted that the law in question is null and void because it violates that provision of the constitution of the United States which declares "that no person shall be deprived of life, liberty, or property, without due process of law." The law under consideration does no more than prescribe the qualifications and disabilities of voters of the territory, and points out the mode by which these qualifications and disabilities shall be ascertained. It is difficult to see wherein these provisions are inconsistent with this clause of the constitution. "Among the absolute, unqualified rights of the states is that of regulating the elective franchise; it is the foundation of state authority. The right of suffrage is altogether a conventional one. It may be granted,

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abridged, or taken away by the state government in its discretion, except so far as it is secured by the state constitution." (*Anderson v. Baker*, 23 Md. 531.) Upon a careful consideration of the whole case we are unable to discover that the statute in question is so clearly repugnant to the provisions of the constitution of the United States as would justify us in declaring it void on that ground, and the judgment of the court below must therefore be affirmed. Judgment affirmed. All concur.

BERRY, J., Concurring.—This case came up from the district court, Bingham county, on appeal from an order refusing a writ of *mandamus*. The only points relied on by the appellant, or urged at the hearing, are: "That the legislature of this territory had no authority to enact the law prescribing the qualification of voters, passed February 8, 1887, and especially sections 501 and 504 of that act." The provision especially objected to is a part of section 501 of the statutes of Idaho, which reads as follows: "No person who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election," etc. The oath which the applicant is required to take is prescribed by section 504. The two sections do not fully correspond. While the latter section only relates to acts and teachings enjoined as a doctrinal rite of such organization, the former prescribes the same acts and teachings enjoined as a doctrinal rite or ceremony of such order, organization, or otherwise. There is no question as to such discrepancy, and the issue is made wholly on the validity of section 501. The effect of restricting the question to section 501 is to remove from the case a point made on the argument, that the denial of the right to vote is based absolutely upon a "rite" or "ceremony" of a religious order. The words "or otherwise" clearly exclude such restricted construction. The statute applies to secular institutions as well as to religious; and as to all secular institutions the argument against the act, from a religious standpoint, will of course fail to apply. But the argument that the legislative

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power to make membership in any organization a condition of right to vote would apply to either class alike had been withdrawn, as we shall hereafter see.

In considering the case the question as to whether the so-called "Church of Jesus Christ of Latter-Day Saints" is a religious organization might be a material question, but the court below held that such organization is a religious association. From such holding no appeal is taken. Hence, however pertinent that question, from the proof in the court below, might appear, it is not at this time before the court, and we shall consider it, with reference to the rights of its members, as a religious organization.

The power of the territorial legislature to determine who shall and who shall not vote at a territorial election is subject to both constitutional and congressional restriction. The legislative power of a territorial legislature extends to "all rightful subjects of legislation, not inconsistent with the constitution or laws of the United States." (U. S. Rev. Stats., sec. 1851.) Such legislature is expressly given the power to prescribe the qualifications of voters at all elections after the first. (U. S. Rev. Stats., sec. 1860.) This granted power is unrestricted, except as to certain specific exceptions, but neither of which exceptions touches this subject matter. It is not pretended that Congress has ever directly repealed this grant of power. If the legislature did not in fact have authority to enact this law, the power must either have been prohibited by the constitution, or it must have been withdrawn by implication, through some act of Congress. In fact, the able and exhaustive argument of the counsel for the appellant is confined to these two points. His constitutional argument centers in this: (1) That article 1 of the amendment of the constitution declares that Congress (and of course the territorial legislatures) "shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press." (2) That the third subdivision of article 6 of the constitution provides that "no religious test shall ever be required as a qualification to any office, or public trust under the United States." (3) That section 9, article 1 of the constitution provides that "no bill of attainder or *ex post facto* law shall be passed." (4) That "no

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person shall be deprived of life, liberty or property, without due process of law"; and concludes (5) by citing the preamble to the constitution, declaring the purposes of that instrument to be "to secure the blessings of liberty to ourselves and posterity."

We are asked to construe these provisions of the constitution liberally, according to their purpose and design thus expressed. To do this it is necessary to consider the subject to which these provisions are to be applied. But before proceeding to do this, it may be observed that some, at least, of these constitutional provisions cannot apply to the case at bar. The fourth point can have no possible bearing upon this case. A law prescribing the qualifications of a voter does not even pretend to deprive a man of his life, liberty, or property, for such privilege is not essential to either. It is not even essential to citizenship, were the latter held to be within the meaning of either of these words. "Citizenship" and "suffrage" are by no means inseparable. Suffrage is not one of the inalienable rights with which men are endowed by their Creator; but it is altogether conventional. (*Anderson v. Baker*, Bright. Elect. Cas. 33.) Again, none of the elementary writers include right of suffrage as among the rights of property or person. (*Anderson v. Baker*, Bright. Elect. Cas. 34.) Such a law is in no sense a bill of attainder. It is not a punishment, or a means of punishment. It is not an *ex post facto* law; for it does not constitute or declare anything whatever, either past or present, to be a crime. It is not a test or qualification for office, either religious or otherwise, that we are considering. It is sufficient to consider that when the question shall arise. Nor is such law directed to the establishment of any religion; nor does it prevent, or tend to prevent, the free exercise of any religion; nor does it abridge, or tend to abridge, the freedom of speech or of the press. Under it a member of the organization in question may do and enjoy all he would do without it, except that he may not have the privilege of voting at an election. We know of no law making such act a religious rite or ceremony.

This would seem to be a fair, plain statement of the case, and of the different reasons against the appellant's construction of each of these constitutional provisions. But he still insists that there is something in the nature of this case calling for a more

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liberal and enlarged construction. He assumes that any law which tends to turn men away from this organization in order that they may enjoy certain privileges tends to the subversion of the "blessings of liberty." We may suppose a case, perhaps, in which such a claim might be allowed, in which this preamble might be invoked to induce a more liberal construction. And, on the other hand, as in case of a claim to the exercise of license and crime, under the guise of "freedom of speech and of the press," may call for a more restricted construction. Whether such a declaration of purpose as this preamble contains calls for a liberal or a restricted meaning would in this point of view, depend entirely upon the nature of the subject demanding the construction. In other words, if unrestricted license to do all that this organization aims at doing tends to the increase of the "blessings of liberty," then the appellant might possibly invoke the declared purpose of the federal constitution, as an aid by which he would have these provisions construed. But, on the other hand, if those aims and purposes shall, on examination, be clearly against morals, public and private; clearly antagonistic to the laws of the land; clearly debasing to Christianity, and subversive of true liberty—then by the same rule a more restricted construction would be called for. Granting that in the case at bar the application of the rule as demanded by the appellant is correct, we may inquire, what are the aims and purposes of that organization which demands this immunity? Some of those aims and purposes are disclosed by the evidence given in the case. The notoriety which this organization has attained, might perhaps, warrant the courts in taking judicial notice of some of its features; but we refrain from going beyond its authoritative record, and refer only to part of its book, "Doctrine and Covenants," given as a whole in evidence upon the trial of this causa. Our reference must necessarily be brief and confined in scope.

On page 159 of that book, in what is there stated to be a "Revelation given through Joseph, the Seer, at Fayette, New York, January 2, 1831," we read: "Thus saith the Lord, your God, even Jesus Christ, the Great I Am, Alpha and Omega: . . . Gird up your loins, and be prepared. Behold, the kingdom is yours, and the enemy shall not overcome. . . . Behold, the

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enemy is combined; and now I show unto you a mystery, a thing which is had in secret chambers, to bring to pass even your destruction in process of time, and ye knew it not. . . . Fear not, for the kingdom is yours. . . . The rich I have made; and all flesh is mine; and I am no respecter of persons. And I have made the earth rich; and behold, it is my footstool. Wherefore, again will I stand upon it, and I hold forth and deign to give unto you greater riches, even a land of promise, a land flowing with milk and honey, upon which there shall be no curse, when the Lord cometh. . . . Ye shall have it for the land of your inheritance, and for the inheritance of your children forever, while the earth shall stand; and ye shall possess it again in eternity, and no more to pass away. But verily I say unto you that in time ye shall have no king nor ruler; for I will be your king, and watch over you. Wherefore, hear my voice, and follow me, and you shall be a free people, and ye shall have no laws but my laws, for I am your law-giver; and what can stay my hand? . . . And again I say unto you that the enemy in the secret chambers seeketh your lives. Ye hear of wars in far countries, and you say there will soon be great wars in far countries; but ye know not the hearts of the men in your own land. I tell you these things because of your prayers; wherefore, treasure up wisdom in your bosoms, lest the wickedness of men reveal these things unto you by their wickedness, in a manner which shall speak in your ears with a voice louder than that which shall shake the earth. But if ye are prepared, ye shall not fear. And that you might escape the power of the enemy, and be gathered unto me, a righteous people, without spot and blameless; wherefore, for this cause, I gave unto you the commandment that ye should go to the Ohio; and there I will give unto you my law; and there you shall be endowed with power from on high; and from thence, whosoever I will, shall go forth among all nations, and it shall be told them what they shall do; for I have a great work laid up in store; for Israel shall be saved, and I will lead them whithersoever I will; and no power shall stay my hand. And now I give unto the church in these parts a commandment that certain men among them shall be appointed, and they shall be appointed by the voice of the church, . . . and this shall be their work: To govern the

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affairs of the property of this church. And they that have farms that cannot be sold, let them be left, or rented, as seemeth them good. . . . And that every man, both elder, priest, teacher, and also member, go to work with his might, with the labor of his hands, to prepare and accomplish the things which I have commanded. . . . And go ye out from the wicked."

In another "revelation," January 5, 1831, page 163, addressed to one James Coville: "Hearken and listen to the voice of Him who is from all eternity to all eternity, the Great I Am, even Jesus Christ. . . . Verily, verily, I say unto thee [Coville] thou art not called to go into the eastern countries, but thou art called to go to the Ohio. And, inasmuch as my people shall assemble themselves to the Ohio, I have kept in store a blessing such is not known among the children of men, and it shall be poured forth upon their heads, and from thence men shall go forth, into all nations. Behold, verily, verily, I say unto you that the people in Ohio call upon me in much faith, thinking I will stay my hand in judgment upon the nations; but I cannot deny my word; wherefore, lay to with your might, and call faithful laborers into my vineyard, that it may be pruned for the last time."

Again, in a "revelation," December 25, 1832, page 304, at a time in the history of the United States when "nullification" troubles in South Carolina had culminated in calling a convention, which was thought at the time to portend civil war, and such trouble seemed imminent, we have: "Verily, thus saith the Lord, concerning the wars that shall shortly come to pass, beginning at the Rebellion of South Carolina, which will eventually terminate in the death and misery of many souls. The day will come that war will be poured out on all nations, beginning at that place; for behold, the southern states shall be divided against the northern states, and the southern states will call upon other nations, even Great Britain, as it is called, and they shall also call upon other nations in order to defend themselves against other nations; and thus shall war be poured out upon all nations. And it shall come to pass after many days slaves shall rise up against their masters, who shall be marshaled and disciplined for war, and it shall come to pass also that the remnants who are left of the land shall marshal themselves, and shall become exceeding angry, and shall vex the gentiles with a



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sore vexation; and thus, with the sword and by bloodshed, the inhabitants of the earth shall mourn, . . . until the consummation decreed hath made a full end of all nations; that the cry of the saints, and of the blood of the saints, shall cease to come up into the ears of the Lord Sabaoth, from the earth, to be avenged of their enemies."

What motives and purposes do these so-called "revelations" disclose? Do they not point directly at results which this organization has since done much to attain? Are they not calculated to cause distrust and hatred of all who are not of this so-called church? They are of the essence of this so-called church, though those we have copied constitute but a small part of such teachings, and do not touch their plan of organization, polity, and system of government. Yet these may be sufficient to show the temporal features and nature of this "Church of Jesus Christ of Latter-Day Saints," with some of its aims and purposes; and help, with other like teachings, to explain the phenomenon of its history. Those parts we have copied are mixed with much matter apparently merely fustian and meaningless, and not apparently explanatory of the general purpose, as indicated by the extracts. These do not touch the extraordinary teachings of polygamy, or plural or celestial marriage; yet those are also included in the blessings of liberty and the pursuit of happiness. We are not at liberty to say these extracts have no meaning, nor that their true meaning and signification are not indicated by the language used. They speak of other people as "enemies," and evidently imply that their presence, their laws and institutions are to be looked upon as a "curse upon the land," which the church aspires to dominate; that in such land there is to be no government or laws, except those alone of the church—evidently the germ of that state of chronic warfare which that "church" has ever, and still does, maintain against all government save that of the church; that even the members of the "church" are not their own masters. Their individuality as freemen and citizens is denied them. Their rights of choice and of action as freemen are merged in the church. Internecine wars are welcomed as a means by which the "gentiles are to be exterminated." The intent to despoil the unsuspecting people of Ohio, who vainly "called with much trust," among them that

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people then seeking a home, and who were giving to those people "much faith," is plainly intimated. The revelations on polygamy and plural or celestial marriage had not then been introduced. They came in 1843, and have since been propagated, with what success the public statutes and records of the courts in some degree show. None of these objectionable features have been expunged or modified, and now license to pursue and realize all these aims is demanded. It is time to speak plainly on this subject. The true interests of this people themselves and all others demand it. The tendency of such principles and purposes is clear. They do not lead to the "security of the blessings of liberty"; but they do lead to its utter subversion. The guaranty of the freedom of speech and of the press is not generally held to be a shield to protect license and crime; nor is there anything in the bare name of religion, when it seeks thus to deal with temporal matters, with the facts and interests of social and political life, that should exempt it from that wholesome rule conceded to license and crime.

We think, if we are at liberty to look at the preamble of the federal constitution, as the appellant asks us to do, as expressing the objects of that instrument, and as an aid in construing its provisions, such expression, applied to the aims and objects of this organization, does not favor the view of the appellant.

But to look further. The question of the validity of the election law has already been before the supreme court of this territory. *Innis v. Bolton*, ante, p. 442, 17 Pac. 264, was a case where a party claiming the right to vote, being challenged, declined to take the oath prescribed in section 504; complying with the law in all other respects, but refusing to take the oath of nonmembership. The right to vote was denied, and he brought an action for damages against the judges of election. Judgment was given for the defendants. The issue was as to the validity of section 504. The reasons for such invalidity were there alleged to be: 1. That the statute is in violation of the first amendment of the constitution; 2. That it is in conflict with the act of Congress of March 22, 1882. On the first point it was urged, as in this case, that to make membership in this organization a test of the right to vote was an infringement of religious liberty, and hence was forbidden. And under the

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second, that Congress, in 1882, in the Edmunds act, in declaring that polygamists and bigamists shall not vote in the territory, had covered the whole ground; and that the legislature was precluded from prescribing any further test in any way, however remotely, connected with those crimes. On both of these points the supreme court overruled the appellants. We think the ruling should be followed. While the section of the statute is not the same in the case at bar as in that, yet the two sections are parts of the same act, and the principle involved in the two is practically the same. But while that case has our approval, it may be well in this to say further that several acts have been passed both by Congress and by the territorial legislature, prescribing the qualifications of voters. The act of Congress of March 3, 1863, organizing the territory of Idaho, is one of those acts. By section 5 of the organic act, it was provided that "every free white male inhabitant above the age of twenty-one years, who shall have been an actual resident of said territory at the time of the passage of this act, shall be entitled to vote at the first election, . . . but the qualifications of voters, and of holding office at all subsequent elections, shall be such as shall be prescribed by the legislative assembly." The legislative power (section 6) was declared to "extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act," except as to laws interfering with the primary disposal of the soil, taxing property of the United States, or taxing property of nonresidents higher than property of residents. Those excepted subjects only were forbidden. The legislature exercised this right in 1864, and again, by Revised Laws of 1874, page 684, the law was entirely changed. The law of 1864 was repealed, and one enacted that "all male inhabitants over the age of twenty-one years shall be entitled to vote at any election," provided they be citizens, etc., and have resided in the territory four months, and in the county where they offer to vote thirty days; but no person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery, etc., unless restored to their civil rights, shall be permitted to vote at any election.

In the Revised Statutes of the United States, passed at the first session of the forty-third session of Congress, 1873-74, as

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further revised and reported September, 1878, provisions on this subject, "common to all the territories," are collated. These provisions differ from that under which the territory was organized, and under which its legislature had acted, up to that time. It is there provided (section 1860) that at all elections after the first "the qualifications of voters, and of holding office, shall be such as may be prescribed by the legislative assembly of each territory," except (1) the right of suffrage and holding office shall belong to citizens, or those who have declared their intention to become citizens, of the United States, over twenty-one years of age, and have taken an oath to support the constitution, etc.; (2) there shall be no distinctions on this subject between citizens on account of color, or previous condition of servitude; (3) no officer, soldier, or mariner, shall, etc., unless he has resided in the territory six months; (4) no person belonging to the army or navy shall hold any civil office. Now, although this act is very full in saying who may and who may not be allowed to vote, nothing is said about persons under guardianship, persons *non compos mentis*, or insane; nor of persons convicted of treason or other crimes; yet no one pretends that this general legislation by Congress affected the *status* of such persons as voters. Congress had only its special purpose in view, and did not cover other ground. But, following that general act, on March 22, 1882, Congress enacted the "Edmunds Law." Its object is expressed to be "to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes." No part of the act touches the power of the legislature, unless, as counsel claim, the eighth section does. That provides that "no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place." In the absence of any expressed intent to repeal the grant of power to the territories, it is not easy to see how this could at all affect such power. It must be borne in mind that the territorial legislature is but a creature of Congress; and while it, for certain purposes, exercises the same power, it acts as a separate political organization. An act of

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Congress is not an act of a territorial legislature, and *vice versa*. Each may act upon the same subject, from its own standpoint, and the acts of each may be valid. In such case their powers are clearly concurrent. But in the act of 1882 the act of Congress does not cover, nor profess to cover, the same ground as the act of the territory. It does not deal with membership in any organization as a qualification to vote. The one subject is not even germane to the other; or, if it has a remote relation, as is contended, Congress did not choose to enter on the ground covered by the territorial legislature. The counsel cites, in addition to the Edmunds act, *Houston v. Moore*, 5 Wheat. 22-24; *Prigg v. Commonwealth*, 16 Pet. 618; *Passenger Cases*, 7 How. 400, and elementary authorities. All the cases cited involve the relation between the several state governments and the United States. In them it is a question of which sovereignty has the power in dispute. Congress exercises powers delegated by the states. If the former have those powers, the latter, except in exceptional cases, does not possess them. No such relations of antagonism exist between Congress and the territories. The will of Congress and that of the territorial legislatures are not two distinct wills, within the holding of some of those cases, but are for certain purposes (of which the act in question is one) one and the same will. While in their operation they are distinct, there is the relation of superior and inferior in all territorial affairs; and the superior may prohibit or nullify the acts of the inferior. Until it does so the acts of the inferior are as valid, within its province, as the acts of the superior. If it were true (though it is not true) that section 8 of the Edmunds act covered the whole ground of section 501, and that each was intended as a punishment for the same offense, under the authority cited by the appellant (*Houston v. Moore*, 5 Wheat. 23), it would seem that the combined acts would be only concurrent, and that both would be valid. (See, also, *Innis v. Bolton*, ante, p. 442, 17 Pac. 264.) But it is not necessary to go to the extent indicated in that case as the two acts do not cover the same ground. After a careful consideration of this case, we do not find the act of the territorial legislature in conflict with any provisions of the federal constitution, or with any act of Congress. The ruling and the judgment of the court below must be affirmed.

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Argument for Appellant.

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(March 5, 1890.)

## TERRITORY v. NEILSON.

[23 Pac. 537.]

**PREJUDICIAL ERROR.**—All errors which do not prejudice the party in his substantial rights must be disregarded; that he was prejudiced in any of his substantial rights will not be presumed when not shown.

**INSTRUCTIONS TO QUIT—ADVISE JURY.**—At the close of the testimony for the prosecution the defendant moved the court to instruct the jury to acquit, which motion the court denied. Held, that such an instruction would have taken the facts from the jury, which the court cannot do, as it can only advise the jury.

**TESTIMONY—WAIVER.**—Where a defendant introduces testimony after a motion to instruct the jury to return a verdict of not guilty is denied, he waives his right to assign as error the order denying such motion.

APPEAL from District Court, Bear Lake County.

Smith & Smith, for Appellant.

Hearsay testimony and evidence of character on the part of the prosecution is not admissible. (*Mima Queen v. Hepburn*, 7 Cranch, 290; *Davis v. Wood*, 1 Wheat. 6; *Regina v. Turberfield*, 10 Cox C. C. 1; *State v. Thurtell*, 29 Kan. 148; *People v. Fair*, 43 Cal. 137; 1 Phillips on Evidence, 644; *State v. Lapage*, 57 N. H. 289; *Cheney v. State*, 7 Ohio, 222.) Where an act may be either guilty or innocent, and there is no proof as to which it is, or where a business may be lawful or unlawful, and there is no proof as to which it is, then it is clear that the presumption is that it is lawful or innocent, as the case may be. (1 Greenleaf on Evidence, secs. 34, 35; Roscoe's Criminal Evidence, \*17.) If error appears in a record, injury will be presumed, unless the contrary clearly appears from the record. That injury might possibly have resulted from erroneous ruling as to evidence and instructions is ground for reversal. (*Leonard v. Kingsley*, 50 Cal. 628; *Smith v. O'Hara*, 43 Cal. 375; *People v. Murphy*, 47 Cal. 103; *People v. Stanley*, 47 Cal. 114, 17 Am. Rep. 401; *Ponce v. McElvy*, 51 Cal. 222; *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83; *People v. Furtado*, 57 Cal. 345; *MacDougall v.*

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*Railroad Co.*, 63 Cal. 431; *People v. Casey*, 65 Cal. 260, 3 Pac. 874.) That injury was highly improbable from the error will not prevent the reversal. (*Chapman v. Quinn*, 56 Cal. 279.) The burden of showing immateriality of error is upon the respondent. The showing must be conclusive in a criminal case. (*People v. Ybarra*, 17 Cal. 166.)

Richard Z. Johnson, Attorney General, for the Territory.

Mere technical errors are not enough to produce a reversal, but it must be such error as produced injury to the substantial rights of the defendant, and upon him is cast the burden of showing it. (*People v. Brotherton*, 47 Cal. 388, 404; *People v. Smith*, 59 Cal. 604; *People v. Johnson*, 71 Cal. 387, 12 Pac. 261; *People v. Turley*, 50 Cal. 471; *People v. Nelson*, 56 Cal. 82; *People v. Olsen*, 80 Cal. 122, 22 Pac. 126.) All intendments are in support of the judgment of the court below, and error is not to be presumed by the court here, but must affirmatively appear in the record. (*People v. Williams*, 45 Cal. 27; *People v. Brotherton*, 47 Cal. 389; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254; *People v. Hope*, 62 Cal. 295; *People v. Winters*, 29 Cal. 661.) A general objection to evidence is not sufficient, but the particular grounds of objection must be stated. The party must lay his finger on the very point of objection. (*People v. Chee Kee*, 61 Cal. 404; *People v. Manning*, 48 Cal. 335; *People v. Apple*, 7 Cal. 289; *People v. Glenn*, 10 Cal. 32; *Martin v. Traversers*, 12 Cal. 243; *Leet v. Wilson*, 24 Cal. 399; *Winans v. Hassey*, 48 Cal. 635.) The court has no right to give peremptory instruction in a criminal case. (Rev. Stats., sec. 7855, subd. 6; Rev. Stats., sec. 7877; *People v. Horn*, 70 Cal. 17, 11 Pac. 470.) The bill of exceptions nowhere states that the evidence therein set forth is all the evidence had at the trial, and there is no presumption here that it contains all, but the presumption will be that the necessary evidence was given at the trial. (*People v. Leong Sing*, 77 Cal. 118, 19 Pac. 254; *People v. Marks*, 72 Cal. 46, 47, 13 Pac. 149; *People v. Huff*, 72 Cal. 118, 13 Pac. 168.)

BEATTY, C. J.—The appellant was indicted for unlawful fishing alleged to have been done in Bear Lake county. At the

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Opinion of the Court—Beatty, C. J.

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close of the people's testimony the appellant moved the court to instruct the jury to render a verdict of acquittal, which motion was overruled. The appellant then introduced testimony in his behalf, and thereafter the jury found a verdict against him, upon which judgment was rendered, from which he has taken his appeal to this court.

The appellant has assigned numerous alleged errors based upon the ruling of the court on the introduction of the evidence. All such alleged errors must be considered in the light of our statute, adopted from the California code, which is to the effect that all errors and mistakes in proceedings which do not prejudice the party in his substantial rights must be disregarded. Under this statute, which seems without ambiguity, it has frequently been held that errors which are not shown to have damaged the party complaining must be disregarded. The criticisms are largely to the admission of questions to which answers were not made, or were not against appellant, or were stricken out. There was also testimony to the effect that appellant had the reputation of being a fisherman. It is not conceded that a party can be convicted of an offense by testimony of general reputation that he has committed it; but the appellant was not charged with any offense of being a fisherman, nor is it an offense, nor does testimony of his reputation as such damage him. We do not think any of the alleged errors based upon the introduction of the testimony are shown to have damaged the appellant. That he was prejudiced in any of his substantial rights will not be presumed when not shown.

It is also claimed the testimony is not sufficient to justify a conviction. The only testimony before us is that introduced by the people, and, as it appears in the record, it is not sufficient. Had appellant rested upon that testimony, and brought it before us in the proper mode for its consideration, a reversal, probably, would be justified; but, instead, he proceeded with the introduction of testimony in his defense. That is not here. We do not know what it was. He may have convicted himself, as has frequently happened with defendants. At any rate, the jury, upon all the evidence, found him guilty, and we cannot interfere.



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Opinion of the Court—Sweet, J., Dissenting.

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At the close of the people's testimony, appellant moved the court to instruct the jury to return a verdict of not guilty, which motion the court overruled; and this is assigned as error. Our statute (section 7877) is adopted from the California code, and provides the court may advise the jury to acquit. By another section (7855, subdivision 6) it is directed the court "must not charge the jury in respect to matters of fact." Had the court given the peremptory instruction asked, it would, in violation of this provision, have taken the facts from the jury. It is held in *People v. Horn*, 70 Cal. 18, 11 Pac. 470, that this the court cannot do, and that it can only advise the jury. Whether, when the court is satisfied the testimony is not sufficient, it must advise the jury to acquit, regardless of the form of defendant's motion, or whether, when there is any evidence tending against the defendant, the court may, in its discretion, leave the question to the jury, we need not now consider nor decide.

After appellant's motion for the peremptory instruction was overruled, he, by introducing his testimony, waived his right to assign as error the order overruling his motion, as is held in civil cases by authority which is controlling with us. (*Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685.) Our statute (section 7864) provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." We think, under our statute, the authorities above control in this case; and the judgment of the lower court is affirmed.

Berry, J., concurs.

SWEET, J., Dissenting.—I dissent from the opinion of the court. When the prosecution rested, there was not, in my judgment, sufficient evidence to warrant or sustain a conviction. The prosecution having failed to prove the guilt of the accused, the latter had a perfect right to invoke the statute. After the court refused to advise an acquittal, the defendant excepted, and offered testimony in his own behalf. It is urged in support of the judgment (1) that defendant moved for an instruction to acquit—an instruction which the court was not authorized to

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Opinion of the Court—Sweet, J., Dissenting.

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give; (2) that, by introducing testimony in his own behalf, he waived his exception; and (3) that the evidence is not all here. I shall consider these points as here presented.

1. The prosecution examined several witnesses, and rested. The defendant then moved the court to instruct the jury to bring in a verdict of acquittal. It is proper to state that the exact language of the motion, which was evidently made in open court, and not reduced to writing, does not appear in the transcript. On page 10 we find the following statement: "The defendant, by his counsel, here moved the court to instruct the jury to return a verdict of not guilty, which motion was by the court overruled." On page 49 of the transcript the motion is presented in this form: "Defendant now moves the court to instruct the jury to render a verdict of acquittal." I quote the two statements as they appear in the transcript for the purpose of showing that the exact words embodied by the defendant in his motion do not appear in the record. This is not material, however, as the substance of both motions is the same. Section 7877 of the Penal Code is as follows: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant; but the jury are not bound by the advice." The court overruled the defendant's motion asking for an instruction to acquit. There is nothing to indicate that the action of the court was governed by any informality in the language of the motion. If, in the judgment of the court, the evidence was such as to warrant it in submitting the case to the jury, it was its duty to overrule the motion. If, on the other hand, the prosecution had failed to establish the charge made in the indictment, it was the duty of the court to advise the jury to acquit. I believe that the exercise of such a discretion is subject to review. The attorney general urges that "the court had no right to give the peremptory instruction in a criminal case as asked at page 10 of the transcript." It is true the court had no right to give the peremptory instruction to acquit, but no court would presume that the motion was overruled by the court below by reason of the fact that the word "instruct" was used by the attorney who made the motion in place of the word "advise." It is proper enough for lawyers to deal in technicalities. By the discussion of tech-

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Opinion of the Court—Sweet, J., Dissenting.

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nical rules, and the attempt to maintain a strict, technical construction of the language of the statute, and the efforts, on the other hand, to obtain a broad and liberal construction of a law, a just and equitable medium of practice is established and maintained. It is, therefore, presumed that, in overruling the motion asking for an instruction to acquit, the court intended to overrule a motion asking it to "advise" the jury to acquit. I shall therefore consider whether or not the court erred in refusing to grant the motion.

When the prosecution rested, I do not think the state had introduced evidence upon which any person could be legally convicted of a crime. I think it follows that the defendant was entitled to the instruction, and that the court erred in not giving it; not because the defendant's attorney, careless of the language he used, asked the court to "instruct" instead of "advise," but because the prosecution had utterly failed to make out a case. It was not an instruction to be given or withheld at the discretion of the court. In the absence of evidence to warrant a conviction, it must be given. To refuse the instruction was to give the sanction of the court to the conviction of the defendant without evidence to justify it; and the jury would have a right to suppose that, under the law, the evidence was sufficient to warrant a conviction. Certainly, such an act on the part of the court would interfere with the substantial rights of the defendant if, as a matter of fact, the evidence given would not warrant a conviction. Whenever a defendant asks an instruction of that character, he accepts the results that may follow a refusal on the part of the court to grant it. If, therefore, his request is refused, and the reasons therefor are sufficient, and he is prejudiced because of the order, the resulting misfortune is his own fault; but it does not justify the court in refusing the instruction asked for, if the *status* of the case demands it. The case cited by the attorney general (*People v. Horn*, 70 Cal. 17, 11 Pac. 470) simply declares that the court was not authorized to give the jury a peremptory instruction to acquit, but says the court was authorized to advise an acquittal. The theory of the law is that a man is innocent until he is proven guilty. This in very many cases is a fiction, and it not infrequently happens that a person brought into court is required to prove his inno-

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Opinion of the Court—Sweet, J., Dissenting.

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cence. But the old theory is still the law, and while the personal liberty of the citizen is the paramount consideration of government it will continue to be the law. By refusing the instruction, when warranted, the court forces the prisoner either to go to the jury with a declaration by the court to the effect, in substance, that the evidence already given warrants a conviction, or, in most instances, to testify in his own behalf; in other words, forces him to prove his innocence.

The attorney general urges that the court was not authorized to advise the jury to acquit under subdivision 6, section 7855, which reads that the court must not charge the jury in respect to matters of fact. We do not apprehend that section 7877 is at all in conflict with the provisions of section 7855. Section 7877 distinctly states that the jury is not bound to act upon the advice given by the court; and, if the court were to advise the jury to acquit, it would be the duty of the court to state that the jury were at liberty either to accept or reject its advice. The fact remains, however, that when a person is charged with crime he must be convicted by legal evidence. The jury pass judgment as to the facts. This is an authority upon which the court dare not trespass. On the other hand, the evidence upon which a person is convicted must be legal evidence; and as to whether or not the evidence tendered is sufficient, under the law, to warrant a conviction, the court, on the last appeal, is the absolute judge. The statute provides that, if the court deems the evidence insufficient to warrant a conviction, it must so advise the jury. If there is, practically, no evidence of guilt, it is not a matter of discretion with the court. Therefore, when the prosecution rested in this case, it was the duty of the court to advise the jury to acquit, regardless of any trifling mistake the attorney may have made in using one word for another. As well say that a court will refuse to dismiss an indictment, when sufficient reasons are given, because the prosecutor, following the old form, asks for a *nolle prosequi* instead of a dismissal.

2. It is urged that the defendant waived his exception to the order of the court under the rule laid down in *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685, and in *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493. The language of the court in the latter case (106 U. S. 701, 1 Sup. Ct.

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Rep. 494) is as follows: "It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony, and introduces none in his own behalf; but, if he goes on with his defense, and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked." If the rule laid down in this case applies to the section before referred to from our Penal Code, and to the rules of criminal practice in this territory, the discussion would be ended and the question settled, so far as this court is concerned. Subdivision 5, section 4354 of the Code of Civil Procedure, under which an action may be dismissed or a judgment for nonsuit entered, gives the conditions under which a nonsuit may be had as follows: "By the court upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." The decision of the supreme court before referred to would, unquestionably, control the method of procedure under this section; but let us place the section from the Penal Code by the side of section 4354 of the Code of Civil Procedure, and note how marked the contrast: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant." This is simply declaratory of one of the principles of the common law—namely, that the guilt of the accused must be proven. In civil cases the court "may," "upon motion," grant the order; under the Criminal Code, the court "must" make the order, without motion, if the condition specified exists. In the case at bar, if the evidence was not sufficient to sustain a conviction, when the prosecution rested, the defendant, under this statute, was authorized to call upon the court for its enforcement; and if, in the judgment of the appellate court, the evidence at that time warranted the request, the prosecution having failed to prove the guilt of the accused by legal evidence, the presumption of innocence and the

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Opinion of the Court—Sweet, J., Dissenting.

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peremptory statute entitled him to that instruction. Evidence that would justify the court below in sending a civil case to the jury in the exercise of its discretion would be one thing, and evidence that would warrant a conviction of a person accused of a crime would be an entirely different thing. The distinction between the two, however, is no more clearly marked than the difference in the two statutes. This construction of the statute, and the rights of the accused under it, are also in harmony with the principles of the common law, which it is intended to modify; and, under the rules of construction, we cannot pass one step beyond the point to which the statute authorizes us to go. Taking this view of the question, it matters little whether, in asking the enforcement of the statute, defendant's counsel used the word "advise" or "instruct"; for, in the absence of evidence to warrant a conviction, it was the duty of the court, under the positive mandate of the statute, to advise the acquittal, whether the defendant asked it or not. The section referred to leaves the common law in force to that extent. Under the common law, the defendant was not heard either in person or by counsel. The case was brought before the court, and the state offered its evidence. If, under that evidence, his guilt was not established, the prisoner was discharged. With the exception of the old presumption still existing in favor of the accused, nothing remains of the old principle except this: "If the evidence does not warrant conviction, the court must advise acquittal." The mandate to obey what is left is as imperative as if the principle of the common law, and the practice under it, had never been modified at all. This is the only power left the court under which it may shield the prisoner in meritorious cases; but it is a positive right left the accused from the common-law practice, and must be exercised under the statute.

Let us consider the matter from the standpoint of another well-known principle. The ruling of the court was, in substance, a declaration to the effect that evidence had been given sufficient to warrant a conviction. If, under the legal effect of legal evidence, this was error, the rights of the accused were seriously and unlawfully injured. He was accused, arrested, and the state presented its evidence of guilt. He was in jeopardy. And, when the state rested, if the evidence was insuffi-

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Opinion of the Court—Sweet, J., Dissenting.

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ient to warrant his being longer held, under the law and the statute that jeopardy was legally at an end, to the extent that the court "must," not "may," advise the jury to acquit; and it was defendant's right to invoke the statute. If the court deny the motion, the accused, if able, may rest and appeal to a higher court. If the accused is poor, he has but this alternative: to go to the jury in the face of this declaration on the part of the court, or attempt to show his innocence both to the court and jury. To testify in his own behalf is his only hope; and thus, if the court err, it ultimately forces the defendant to the witness-stand, and indirectly enforces and continues his jeopardy. In other words, the prosecution having failed to prove the guilt of the accused, the latter must still come forward, and prove his innocence.

3. It is also urged that the evidence is not all here. The presumption is that the transcript contains all of the evidence bearing upon the objection made by the defendant. It is too late for the respondent to object to the transcript. The Idaho statute, under which a bill of exceptions is prepared in criminal cases, was taken from the California Penal Code, and the principle in issue has been repeatedly passed upon by the supreme court of that state. In the case of *People v. English*, 52 Cal 211, the same question was raised that is presented here. The court held that a bill of exceptions, in a criminal case, is presumed to contain all the evidence given at the trial bearing upon the point of the objection, and that, if the bill of exceptions prepared by the defendant in a criminal case does not contain all the evidence given, bearing on the point made, the district attorney should be permitted to suggest an addition to the bill of such evidence; but the appellate court cannot take his suggestion that such evidence was given. It is the duty of the district attorney to see that the evidence is here. This principle was confirmed in *People v. Dye*, 62 Cal. 524. It is urged that, under our statute, the rules of evidence in civil and criminal cases are the same, except as otherwise provided by the code. That is true. This is not, however, a question of admission of evidence. It is a question of practice, and it is also a question of law; and I do not see that this rule of evidence has any bearing whatever on the issue at bar.

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Opinion of the Court—Beatty, C. J.

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I must conclude that the court erred in declining to advise an acquittal, and that it was such an error as to interfere with the substantial rights of the defendant. It was such an error as might result in the conviction of an accused person through prejudice. In other words, under the evidence, it was an error that might prompt a jury to convict an innocent man, under the apparent sanction of the court, without evidence to warrant or sustain the conviction.

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(March 5, 1890.)

MARTIN ET AL. v. ATCHISON ET AL.

[33 Pac. 470.]

**JUDGMENT CREDITOR—RECEIVER.**—A judgment creditor is without an adequate legal remedy when the title of the defendant's property is clouded by a fraudulent assignment thereof and by another judgment which, though fraudulent, is held a prior lien, and when such property is in the hands of a receiver to be sold for the benefit of such fraudulent judgment.

**RECEIVER.**—A receiver cannot be sued without first obtaining the permission of the court which appointed him.

(Syllabus by the court.)

**APPEAL** from District Court, Shoshone County.

Albert Hagan, for Appellants.

Charles W. O'Neil, for Respondents.

No briefs filed in the case.

**BEATTY, C. J.**—The complaint alleges that on the twelfth day of May, 1887, one Brile obtained judgment for \$650.25 in the district court of Shoshone county against defendant the Kentucky Smelting and Mining Company, which was sold and assigned to plaintiffs; that on March 31, 1887, defendant company by a deed of assignment transferred, for the benefit of its creditors, to defendant Gregory, a certain smelting property described in the complaint; that said assignment was illegal and void; that



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Opinion of the Court—Beatty, C. J.

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on January 24, 1887, one Wessells filed his mechanic's lien against defendant company and its property for about \$1,400, and on February 23, 1887, commenced in said district court his foreclosure action on said lien; that on April 6, 1887, said Wessells died, when defendant Atchison was appointed his administrator; that on November 25, 1887, by stipulation of parties, said administrator recovered judgment against defendant company for about \$1,000, which was declared a prior lien against said company's property; that at the same time, defendant Lowering was appointed by said court receiver to take charge of said smelting property, sell it, and apply the proceeds to the payment of said Wessells judgment; that the claim of said Wessells was fraudulent, and that defendant company was not indebted to him; that the Wessells judgment was recovered through such proceedings, which, if true, would make it fraudulent, and in them all the defendants except Lowering were concerned; that in consequence of these proceedings, the property being in the hands of the receiver Lowering, and the Wessells judgment being held the prior lien, plaintiffs are unable to enforce their judgment by the sale of said smelting property; and plaintiffs then ask, in effect, that their judgment be declared the prior lien and claim against said smelting property, and the receiver be restrained from selling the latter. To the complaint, defendants interposed their demurrer, which being overruled by the court, they refused to answer, and judgment was rendered against them as prayed. From this judgment they have appealed to this court, and the cause is submitted without argument, but upon briefs of the respective parties.

The defendants by their demurrer, and here, claim that plaintiffs had an adequate remedy at law. How and by what means? They allege the smelting property is all the defendant company had, and, this being in the possession and under control of the court, plaintiffs could not proceed against it. Suppose it had not been in the hands of the receiver, what adequate remedy at law would plaintiffs then have? All they could do would be to issue execution, and sell the property in pursuance of their judgment. But with this prior alleged invalid assignment of the

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Opinion of the Court—Beatty, C. J.

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property, and the lien of the Wessells judgment against it, who would purchase it? The probability is no one would at anything over a nominal sum, or for anything near its value. The result would be that plaintiffs would be compelled to buy in the property, and then bring an action against all these parties to clear the cloud against the title. Plaintiffs may not want to purchase the property; they may prefer it to be sold for its full value, and they get their money. The only way this would be possible would be the clearing away of these claims against it, the clouds upon its title, all of which plaintiffs are entitled to if the allegations of their complaint are true. We do not think plaintiffs had an adequate remedy at law, but that they are entitled to a remedy, at least, similar to that they are pursuing by this action.

The appellants also claim there is a misjoinder of parties defendant, and in that the receiver Lowering is made a party defendant without permission first had of the court appointing him. We think the claim of appellants is correct. The receiver is an officer of the court, in all respects subject to its orders and directions, and, in so far as his duties as such go, is not amenable to any other power or authority, and at all times is under the protection of the court, and the property in his hands is *in custodia legis*. To permit anyone to bring actions against him concerning such property would be to remove him from the protection of the court, and the property from its possession and control. If the action can be commenced against him, it may proceed to judgment, and the property actually in his possession by the prior order of the court sold; thus bringing the different orders and judgments of the court on the same subject directly in conflict. If such proceedings can be tolerated, then the appointment of receivers by courts would be a useless ceremony—a farce. The plaintiffs are not without a remedy, for they may ask the court to allow the receiver to be made a party, under such restrictions as the court deems best for the preservation of the property, of its own authority, and the protection of its officers; or the court may, upon the proper showing being made, require the receiver, if the property is sold in pursuance of its former order, to hold the proceeds thereof subject to the further directions of the court. Upon principle, this question seems clear, without the citation of authorities. In support of the

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Points decided.

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view above expressed, one controlling with us is *Barton v. Barbour*, 104 U. S. 128, which says: "It is a general rule that, before suit is brought against a receiver, leave of the court by which he was appointed must be obtained. *Davis v. Gray*, 16 Wall. 203, and cases there cited. But the learned counsel for plaintiff in error strenuously contends that the only consequence resulting from prosecuting the suit without such leave is that the plaintiff may be restrained by injunction or attachment for contempt, and that the rule applies only to cases where the suit is brought to take from the receiver property whereof he is in possession by order of the court. We conceive that the rule is not so limited." The court continues then to the distinct conclusion that an action cannot be commenced against a receiver without permission of the court which appointed him. There are some other questions discussed by appellants in their brief which we do not deem it necessary to further refer to, as they can be better determined by the lower court when upon the trial of the cause all the facts are before it. We therefore conclude the judgment of the lower court should be reversed, and the cause thence remanded for such action in harmony herewith as to such court may seem best; and it is so ordered.

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(January 28, 1890.)

## COFFIN ET AL. v. EDGINGTON ET AL.

[23 Pac. 80.]

**DEATH OF PARTY—SUBSTITUTION.**—After judgment was rendered, and before notice of appeal was filed or served, one of the defendants died, no substitution having been made; held, that all proceedings on the appeal were null and void as to the representatives of the deceased defendant.

**SERVING NOTICE OF APPEAL.**—If a party to an action dies after the rendition of judgment and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney before substitution will not bind the representatives of the deceased or any other party in interest.

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Opinion of Court—Sweet, J.

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**SAME.**—Any party to an action, whether plaintiff or defendant, may appeal, but the notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or interveners.

(Syllabus by the court.)

APPEAL from District Court, Alturas County.

Lyttleton Price, F. E. Ensign and V. S. Anderson, for Appellants.

No brief filed.

Kingsbury & McGowan, for Respondents.

Appeal taken under section 4808 of the Revised Laws. Notice must be served on each adverse party. (*Williams v. Santa Cruz Min. Assn.*, 66 Cal. 193, 5 Pac. 85; *Senter v. De Bernal*, 38 Cal. 637; *In re Medbury*, 48 Cal. 83; *Reed v. Allison*, 61 Cal. 461; *O'Kane v. Daly*, 63 Cal. 317.) "Adverse" party defined. (Hayne on New Trial and Appeal, pp. 630, 631; *Senter v. De Bernal*, 38 Cal. 64; *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130; *O'Kane v. Daly*, 63 Cal. 317.) Death revokes the authority of an attorney. (Hayne on New Trial and Appeal, 631; *Judson v. Love*, 35 Cal. 463; *Shartzen v. Lou*, 40 Cal. 96; *Sheldon v. Dalton*, 57 Cal. 19.)

SWEET, J.—These are appeals from the second district. It is unnecessary to make a statement of the facts involved in the case. It is here presented on a motion by the respondents to dismiss the appeals, and a review of the proceedings in connection therewith will enable us to dispose of the issue at bar.

On the ninth day of October, 1889, E. C. Coffin, R. W. Berry, J. M. Burkett, and W. H. Redway, doing business under the firm name of Coffin & Co., obtained a joint and several judgment against A. P. Turner, W. J. Edgington, W. H. Nye, V. S. Anderson and J. S. Lewis for the sum of \$933.35, with interest. On the eleventh day of October, 1889, defendants filed and served their notice of appeal. Defendants appeal from the judgment, as well as from the order overruling the motion for a new trial. The appeals were perfected, and the cause was regularly

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Opinion of Court—Sweet, J.

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called for hearing in this court. The respondents submit two motions; one of them being a motion to dismiss both appeals. The other asks for an order of this court affirming the judgment of the court below as against appellants T. J. Edgington and J. S. Lewis. The motions were not presented in this order; but, for reasons that will appear, we consider the second motion first. The second motion is based upon an affidavit made by R. W. Berry, one of the plaintiffs, in which he sets forth the fact that after the entry of the judgment in the court below, "and before the notice of appeal herein was filed or served, and before any of the proceedings on the said appeals were had or taken," defendant Lewis died. The facts set forth in the affidavit are admitted. The affidavit of Berry was filed in this court before the cause was called for argument. This was the proper time to direct the attention of the court to the fact, and the manner adopted was approved in *Judson v. Love*, 35 Cal. 467. It further appears from the transcript, as well as from the admissions of counsel, that no substitution of the personal representatives of the deceased defendant was had in the lower court prior to the proceedings had on appeal, and that the attorney for Lewis acted in behalf of the latter's representatives, in said proceedings, without authority.

The question presented is as follows: Has this court jurisdiction to hear and determine this appeal, in view of the fact that all of the proceedings taken and had on the appeal were subsequent to the death of said defendant Lewis? We think not. In the case of *Sheldon v. Dalton*, 57 Cal. 19, the court say: "There were two plaintiffs in this case, one of whom died before this appeal was taken. There was no suggestion of the death, and no substitution of the personal representative of the deceased plaintiff. It is conceded that the appeal was prematurely taken, and the motion to dismiss is granted." In the case of *Judson v. Love*, 35 Cal. 466, the same question was involved. Judge Sawyer, speaking for the court, uses the following language: "A motion is made to dismiss the appeal as to the defendant Love, based, firstly, upon exceptions to the transcript; and secondly, upon affidavits filed showing that defendant Love died on the 15th of March, 1866, after the rendition of the verdict in the court below, and before any notice of intention to move

## Opinion of Court—Sweet, J.

for a new trial was given, on the ground that all subsequent proceedings, and motion for new trial, and the attempt to appeal, are void and ineffectual for any purpose as to said defendant Love and his successors in interest, for want of any proper party to the suit, or of any person upon whom a valid service of papers could be made." Again, the court say: "It is clear that all these proceedings, except the entry of judgment on the verdict before rendered, had since the death of defendant Harlow S. Love, on the fifteenth day of March, 1866, are irregular and void as to him, and his successors in interest. There was from that time forth no party before the court as to the interest of Love in the matter in controversy, and no one authorized to represent it. The power of attorney necessarily ceased with the death of the principal. No further proceedings could be had without bringing in the representatives of Love. The Practice Act authorizes a judgment to be entered upon a verdict when a party dies after verdict and before judgment, . . . but this is as far as it goes. *Warren v. Eddy*, 13 Abb. Pr. 30, is in point. Notice of argument had been served on the attorney of defendant after the death of the latter. The court say: 'At the time of the service of the notice, J. W. Culver could not act for a dead man, and he had no authority to act for or represent the estate. The order of the general term for affirmance by default, founded on such notice, was therefore irregular, inasmuch as it was made without notice to any one representing the estate of Daniel F. Eddy.'" Again, the court say: "His former attorney could not give a notice of motion for new trial or of appeal that would be effectual, for he had ceased to have any authority in the matter. If he has no authority to give such notice, he has none to receive one, or act upon it, in the further stages of the proceedings, when it is received. He has become a stranger to the proceedings." It is unnecessary to quote authorities further upon this point. The principle is well known and thoroughly established. It is evident, therefore, that no proceedings can be had in this court affecting the interests of the representatives of the deceased defendant.

The next question is, Could an appeal be taken by the defendants in this case before a substitution was made? It would seem to be impossible. The judgment rendered against defendants

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Opinion of the Court—Sweet, J.

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was joint and several in its character. No decision of this court can be rendered affecting one of the defendants without affecting all. This fact makes them adverse parties, within the statute. It may be worth while to define the meaning of "adverse party," as contemplated by law. In *Senter v. De Bernal*, 38 Cal. 640, the court say: "The question is as to the meaning of the words 'adverse party,' as here used; and as to that we think there can be no rational doubt. Every party whose interest in the subject matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party,' within the meaning of these provisions of the code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener. Such was declared to be the meaning of this language as used in the statutes and rules of the court of chancery of New York prior to the adoption of the code in that state." Our statute allows an appeal to any and every person who may feel aggrieved; but it requires of the appellant that he shall serve a notice of his appeal upon all parties who may be affected by any decision the appellant court may render affecting the interests of the parties. This cause clearly comes within the rule, as any decision affecting the interests of the representatives of Lewis must certainly affect the other defendants to the action. In the case of *Thompson v. Ellsworth*, 1 Barb. Ch. 627, after stating that any person may appeal, whether the judgment against him be joint or several, the court say that he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formerly appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual; and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former, also.

It is further urged by counsel for respondents that this appeal should be dismissed for the reason that the undertaking was served prior to the notice of appeal. It is unnecessary to go into the merits of this question, inasmuch as the appeal must be dismissed for the reasons already stated.

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Points decided.

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But appellant asks that, in the event of an order of dismissal, the appeal be dismissed without prejudice. We do not see any reason why the representatives of defendant Lewis, in whose interest the appeal is taken, cannot appeal to-day, if they so desire. Each and every step taken in the proceedings had on appeal is utterly void. The representatives of the deceased defendant are not bound by them. In short, no appeal has been taken. Therefore the rights of the representatives of Lewis cannot be prejudiced. However, section 4823 of the Revised Statutes provides that "the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal." The court may, unquestionably, order the dismissal of an appeal without prejudice; and perhaps it is always safer to do so, when the facts justify it.

The motion submitted by respondents asking that the judgment be affirmed as against Lewis and Edgington is practically disposed of by the authorities cited. If this court is without jurisdiction of the defendants, it certainly cannot make an order that would be binding upon them; and that no such jurisdiction has been acquired is evident. The motion, therefore, to affirm the judgment as against Lewis and Edgington is overruled, and the motion to dismiss the appeal as to all the defendants is granted, without prejudice to another appeal.

Beatty, C. J., and Berry, J., concur.

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(January 29, 1890.)

DUNNIWAY ET AL. v. LAWSON ET AL.

[23 Pac. 78.]

**PRACTICE—APPEAL—DISMISSAL.**—In an action where relief is granted both parties, on motion to dismiss the appeal under rule 3 of the supreme court, the certificate of the clerk below, under rule 4, not showing the nature and substance of the judgment appealed from, held, that said certificate will not justify dismissal of the appeal.

**RULES DIRECTORY.**—Rule 3 is directory, and gives no right to a party to demand its enforcement.



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Opinion of the Court—Berry, J.

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**SHOWING FOR DISMISSAL.**—The court will not dismiss an appeal under rule 3 unless it be made to appear that justice requires such dismissal.

(Syllabus by the court.)

**APPEAL** from District Court, Custer County.

J. T. Morgan, for Appellants

No brief on file.

Angel & Sullivan, for Respondents.

No brief on file.

**BERRY, J.**—This is a motion by respondents to dismiss an appeal in the above-entitled action, which motion is made under rules 2, 3 and 4 of this court, and upon the certificate of the clerk of the district court of Custer county. The rules are as follows:

Rule 2. "When an appeal or writ of error has been perfected thirty days before the commencement of the next regular or adjourned term of this court, the transcript of the record shall be filed at least three days before the first day of such regular or adjourned term."

Rule 3. "If the transcript of the record is not filed within the time prescribed [by rule 2], the appeal or writ of error may be dismissed, on motion, without notice, on Monday of the week during which the cause is subject to call, under rule 8. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party. Unless so restored, the dismissal is final, and a bar to any other appeal or writ of error from the same order or judgment."

Rule 4. "On such motion there shall be presented the certificate of the clerk below, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the motion of appeal, or issuing of the writ of error; the fact and date of the filing; the undertaking on appeal or writ of error; the fact and time of the settlement of the statement, if there be one; and also that the appellant has received a duly certified transcript, or that he had not re-

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Opinion of the Court—Berry, J.

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requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.”

It is clear that rule 3 is more in the nature of a statement, or notice by the court, of what it will be likely to do under a given statement of facts, than of a declaration of rights of a party litigant. The right in the court to dismiss, when in its opinion the interests of justice demand such action, and only when it is so demanded, puts upon the party requesting such action the burden of convincing the court, by a proper showing of facts, that the interests of justice require such action. Rule 4 seems specially intended to effect that purpose. The certificate of the clerk is to inform the conscience of the court. The clerk of the court below makes his certificate in substance as follows: “That on the second day of October, 1889, judgment was rendered in said district court, in favor of the plaintiffs . . . and against said defendants, for costs of plaintiffs in said action amounting to the sum of \$858.95, and that each of said defendants be adjudged to pay one-third thereof, to wit, the sum of \$286.32, and that Paul P. Lawson and Chris Rogers have, and each of them has, the right to the use of ten inches of the water of Alder creek, a tributary of Big Lost river, and to use no more than ten inches each, measured under a four-inch pressure, unless there shall be more than two hundred and twenty inches of water running in said creek; and I further certify that on the twenty-ninth day of November, 1889, I received an order made by C. H. Berry, judge of said district court, ordering and directing that all papers and files including evidence, in above cause, be sent to the clerk of the district court at Blackfoot, which was accordingly done; and I further certify that no notice of appeal from the judgment entered in said cause on the second day of October, 1889, has been filed in this office, nor has any been presented at this office for filing, nor has any statement on appeal from said judgment been settled and filed in this office, nor has any person requested that a transcript of the record of said action be made out and certified to the clerk of said district court, and sent such request to this office, but on the fifth day of December, 1889, an undertaking for stay of exe-

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cution was made out by Paul P. Lawson, one of the defendants in said action, in the sum of \$600, being more than double the amount named in said judgment, and was duly filed in this office according to law."

It will be observed that this certificate, while it states many facts, states few required by rule 4. Incidentally upon the argument, however, it appeared that a notice of appeal by the defendants from the judgment had been served more than thirty days prior to the first day of this term of the supreme court, and that an appeal bond, regular in form, had been filed in the office of the clerk in the court below; also that the action in which the judgment was entered was an action in equity, in which a decree was made in favor of the respondents in those things constituting the subject matter of the said action. Aside from those general facts, this court is not further informed in the case. It is not alleged that any hardship to the respondents exists by reason of the failure to file in time the transcript on appeal; and if the respondents are not being injured, *prima facie* at least, they have no cause to complain. But the appellants' counsel gives reasons for the delay. He alleges that, in addition to the appeal from the judgment, it is his purpose to move for a new trial of the case, and thereby reach a more comprehensive remedy than would alone be an appeal from the judgment, or the bringing into this court of the judgment-roll; that, in case his motion for a new trial is denied, he desires to appeal the order of denial; and that, if he gets a new trial, the necessity for any appeal may be avoided. He also avers that the statement of his case, on which he proposes to move, on account of causes beyond control, is not settled, or even yet made; and that, in view of such facts, the court below has extended the time for settlement of a statement to a time not yet expired.

There is nothing to cast doubt upon the entire good faith of these allegations, and in themselves they are certainly consistent with fairness and the interests of justice. We do not think, from this standpoint, that we are called upon to exercise this reserved power, and summarily dismiss the appeal. But beyond this, as we have seen, the respondents' counsel has not brought himself within the conditions prescribed by rule

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Argument for Respondent.

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4. The certificate does not even show the nature of the judgment appealed from, except in the single matter of costs and certain minor provisions in favor of the appellants. In the absence of a more full and complete showing, the court is precluded, by its own rules, from dismissing the appeal as prayed, and the motion to dismiss must be denied.

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(February 12, 1890.)

MURPHY v. BARTSCH.

[23 Pac. 82.]

**PLEDGE AS COLLATERAL SECURITY.**—When a party takes any property as a pledge for the security of a debt, which through his gross neglect is lost, he must bear the loss, and he must exercise ordinary diligence in all cases.

**CONTRACT BETWEEN THE PARTIES.**—When there is none as to the disposition to be made of the pledge, and the pledgor claims it is lost by neglect, he must show the neglect and the damage resulted to him therefrom.

(Syllabus by the court.)

APPEAL from District Court, Alturas County.

A. F. Montandon, for Appellant.

Defendant's order, being specific as to amount, acceptance, and time of payment, was a bill of exchange, negotiable and subject to all rules of commercial paper. (Code, secs. 3520, 3525, 3546, 3550; *Cowan v. Halleck*, 9 Colo. 572, 13 Pac. 700; *Parsons on Mercantile Law*, 2d ed., p. 84, sec. 1; *Parsons on Bills and Notes*, pp. 52, 54, 353, sec. 1.) Plaintiff, being the holder, was bound to make demand for payment, and, if dishonored, to give defendant "drawer" notice. (Dean on Commercial Law, Bryant & Stratton ed., sec. 353; *Donohoe v. Gamble*, 38 Cal. 340, 99 Am. Dec. 399.)

Kingsbury & McGowan, for Respondent.

There being no exception in the record, if complaint states a cause of action, and will support a judgment, the judgment

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must be affirmed. (*Lamkin v. Sterling*, 1 Idaho, 120; *Purdy v. Steel*, 1 Idaho, 216; *Gamble v. Dunwell*, 1 Idaho, 268; *Diehl v. Hull*, 1 Idaho, 352; *McCoy v. Oldham*, 1 Idaho, 465; *Hyde v. Harkness*, 1 Idaho, 638; *Fox v. West*, 1 Idaho, 782.)

BEATTY, C. J.—On October 18, 1886, appellant delivered his promissory note to respondent for the sum of \$500, due the next day, and, as collateral security for its payment, transferred a demand he held against one Shaw, payable on the first day of November, 1886. At this latter date, Shaw was solvent, but by April following became insolvent; just when does not appear. In August, 1887, this action was commenced for the recovery of the \$500 note, to which appellant interposed the defense that respondent had neglected to collect the claim against Shaw, which by the latter's subsequent insolvency became wholly lost to appellant. Judgment followed for respondent, from which defendant appeals here, and he now claims the demand against Shaw was a bill of exchange, of the dishonor of which he is entitled to notice, according to the law-merchant; also that defendant's failure to collect the same must be held such negligence as will charge him with its loss. The record does not inform us clearly of the nature of this claim against Shaw. Appellant, in his answer, says it was a "bill of items" for goods sold to Shaw; that Shaw admitted the same was correct, indorsed his acceptance thereon, and appellant then assigned it to respondent. The findings refer to it as an order drawn by appellant on Shaw, payable to respondent; also as a "demand" against Shaw. Appellant has not shown it was a bill of exchange, or even a chose in action, negotiable in form. It was, however, an evidence of a debt admitted by Shaw to be due from him to appellant, and by the latter transferred as collateral security to respondent. The record shows respondent made no special demand of appellant for payment of his note; neither did the latter request respondent to collect the Shaw claim, nor did the latter attempt to collect it. No agreement existed between the parties for its collection other than that implied by law. The record simply shows the collateral was accepted, was not collected, that Shaw became insolvent and the claim against him was

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lost. Does its loss, under such circumstances, become the loss of the respondent?

From the briefs of counsel, we conclude they were unable in their researches to find relevant authorities by which the court might be aided to the correct conclusion, and in our effort to supplement their labor we have found the courts on this question in considerable, at least apparent, conflict, in part the result of difference in the facts of the cases. It is impossible to prescribe any definite, unyielding rule applicable to every case of property pledged as collateral security. Each case must be determined more by the attendant facts and circumstances than by any fixed standard. In all cases, however, the pledgee will be responsible for any loss resulting from his gross negligence; and generally, to avoid such responsibility, he must exercise at least ordinary care and diligence. It must be borne in mind he does not sustain to such property the relation of owner. As such, he would, of course, bear all loss, whether occurring through theft, fire or other accident. When he holds it as pledgee, it operates as an accommodation to the owner also, by extending the time of payment of his liability; and the pledgee so holding it would not be liable for its loss by accident, unless the result of his gross carelessness. In this case, what is the negligence of respondent of which appellant can complain? The latter says he was entitled to prompt notice of the dishonor by Shaw of the claim. We do not think so. One of the objects of giving notice of the dishonor of commercial paper is that the indorser may be held responsible. It does not appear that the claim here against Shaw was a bill of exchange; and even if it were, and respondent had given appellant prompt notice of its dishonor, he would not have had any recourse against respondent, or in any way added to his responsibility. Hence, all the reasons of the rule requiring notice of the dishonor of commercial paper not existing, the rule itself is subject to modification.

The appellant invokes in his behalf the provisions of section 3601 of our statutes. That and the next preceding section clearly refer alone to written evidences of debt sold and transferred for value, and not to those deposited as collateral security. These sections provide that when the assignee, after

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due diligence, fails to recover thereon, he can then hold the assignor responsible. But in our case had the respondent made every effort to collect the debt, and failed, he could not have any recourse against appellant therefor, or even for his expenses incurred in his effort to collect. In this case it does not appear that the respondent was grossly negligent, nor does it appear there were any particular acts of negligence. It does not appear certainly that he could, if he had tried, have collected the Shaw claim. There may have been good reason why he could not. As he did not the presumption is that he could not, rather than that he would not. There is no actual evidence of his neglect, unless the mere fact that he did not collect it must be so construed. If, however, the appellant insists such is the legal conclusion, it still devolves upon him to show that such negligence resulted in his damage; for damage cannot be presumed—it must affirmatively appear. It would be preposterous for appellant to claim a benefit from the harmless negligence of respondent. The question, then, is not whether respondent was negligent, but whether he must be presumed, without proof, to have committed such neglect as resulted in appellant's damage. There is not in this record any such proof. *Lawrence v. McCalmont*, 2 How. 454, is a case where notes deposited as collateral security were not duly protested, and the court says: "No evidence was shown at the trial to establish any loss or damage . . . for want of due protest and notice; . . . and, in the absence of such proof, we are not at liberty to presume that the agents did not do their duty." The same is held in *Aldrich v. Goodell*, 75 Ill. 457. In *Wilkinson v. Culver*, 33 Fed. 708, it appears bonds and choses in action were assigned as collateral security, with the agreement that the proceeds from their sale should be applied to the reduction of the secured debt. The pledgee failed to sell the same, and loss resulted to the pledgor. The court says the obligation of the pledgee did not differ from that "usually and naturally resting upon holders of collateral security of same character, viz., that a sale, in the absence of a request to sell, or the commencement of suits, was not compulsory, but was to be at the discretion of the pledgee." In *Bast v. Bank*, 101 U. S. 93, a valid judgment was assigned as collateral. The

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bank neglected to collect it, and in the meantime it became worthless. The court held it was not the bank's loss. *Rice v. Benedict*, 19 Mich. 132-135, is a cause much like this, in which it was held the pledgee was not responsible for the loss of the securities; and in the same line are *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551; *Robinson v. Hurley*, 11 Iowa, 412, 79 Am. Dec. 497, and note; *Goodall v. Richardson*, 14 N. H. 567; *Fletcher v. Harmon*, 78 Me. 465, 7 Atl. 271; while more or less to the contrary are *Kennedy v. Rosier*, 71 Iowa, 671, 33 N. W. 226; *Easton v. Bank*, 24 Fed. 523; and *Hanna v. Holton*, 78 Pa. St. 334, 21 Am. Rep. 23. To these, many others might be added, entertaining almost every shade of view on the question. But, after considerable examination, we conclude the judgment of the court below should be affirmed, except that it should be so modified as to bear interest from its date at the rate of ten per cent per annum; and it is so ordered.

Berry and Sweet, JJ., concur.

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(February 12, 1890.)

TERRITORY v. BOWEN

[23 Pac. 82.]

HOUSES OF PROSTITUTION—MISDEMEANOR.—To establish the fact that a house is kept for the purpose of prostitution, evidence of its general reputation as such is competent.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

No briefs filed.

D. P. B. Pride and T. D. Cahalan, for Appellant.

R. Z. Johnson, Attorney General, for the Territory.

BEATTY, C. J.—The indictment in this cause charges that the appellant “did unlawfully keep a house for the purpose of



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prostitution," upon the trial of which she was found guilty of the charge; and thereupon the court rendered judgment against her of imprisonment in the county jail of Ada county for the period of four months, and that she be fined in the sum of \$150. From such judgment she has prosecuted her appeal to this court, and now, without further contest here, she represents that she suffered imprisonment under such judgment for the period of three weeks before being released on bonds; that she has discontinued the offense of which she was charged, and prays the court for a modification of the judgment against her. The attorney general, representing the territory, not disputing the statement made by appellant, consents to a modification of the judgment, but claims that the law as given by the trial court should be affirmed.

The section (Rev. Stats., sec. 6842) of our statutes upon which the indictment is based provides that "every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor."

Under this indictment and the statute two questions are involved: Was the house referred to in the proceedings kept for the purpose of prostitution? And, Did the appellant keep it?

The first question is disposed of by establishing the character of the house. To do this it is not incumbent on the prosecution to prove particular, or any, acts of prostitution committed in the house. This, in the nature of things, would be impracticable, and generally impossible. Such acts are veiled from the public eye, and are known only to the participators therein, whose interest it is to carefully conceal them. Whatever difference of opinion may have existed on this subject, it is now settled by the weight of authority that in actions of this nature evidence of the general reputation of the house is competent and admissible to establish its character; and so we hold. (*People v. Buchanan*, 1 Idaho, 688; *Sara v. State*, 22 Tex. App. 639, 3 S. W. 339; *State v. Smith*, 29 Minn. 193, 12 N. W. 524; *Drake v. State*, 14 Neb. 535, 17 N. W. 117; *State v. Mack*, 41 La. Ann. 1079, 6 South. 808;

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Argument for Appellant.

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*Graeter v. State*, 105 Ind. 271, 4 N. E. 461; *State v. Brunell*, 29 Wis. 435.)

There was evidence to the satisfaction of the jury that the house was kept for the purpose of prostitution, and that the appellant was its keeper, which justifies the judgment, but, in consideration of the facts above stated, we direct that the trial court so modify its judgment that the sentence of imprisonment be remitted; but in all other respects the judgment is affirmed.

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(February 13, 1890.)

## CHAMBERLAIN v. WOODIN.

[23 Pac. 177.]

**NONSUIT—TESTIMONY—ELECTIONS.**—When a motion for nonsuit is made by the defendant at the close of plaintiff's testimony, because of its insufficiency and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.

**TESTIMONY—INSUFFICIENCY OF.**—A judgment will not be reversed when there is a substantial conflict in the testimony, or unless it seems the result of passion or prejudice.

**ELECTIONS.**—When so irregular and fraudulent that the true result cannot be ascertained from the returns of the poll, they should be rejected and the true result shown by other evidence.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

Hawley & Reeves and W. H. Savidge, for Appellant.

The issues being all material, it was the duty of the court to find thereon, and the failure to fully find upon them, and each of them, is sufficient ground for reversal of the judgment herein. (*Porter v. Muller*, 65 Cal. 512, 4 Pac. 531; *Campbell v. Buckman*, 49 Cal. 362; *Dowd v. Clarke*, 51 Cal. 262; *Speegle v. Leese*, 51 Cal. 415; *People v. Forbes*, 51 Cal. 628; *Kennedy v. Berry*, 52 Cal. 87.) To avoid the election, the

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Argument for Respondent.

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misconduct of election judges must be such as to procure a person to be declared elected when he has not received the highest number of votes. (Rev. Stats., sec. 5027; Paine on Elections, 187-196; McCrary on Elections, 105-510, 600.) The presumption is in favor of the validity of the election. (*Commonwealth v. Lee*, Bright. Elect. Cas. 98; *People v. Clark*, 1 Cal. 408.) It is only where the provisions of the election law have been entirely disregarded by the officers, and their conduct has been such as to render their returns utterly unworthy of credit, that the entire poll may be rejected; and even in such case the votes actually polled must be computed. (*Littlefield v. Green*, Bright. Elect. Cas. 493; *Piatt v. People*, 29 Ill. 72; *People v. Cook*, 8 N. Y. 68, 59 Am. Dec. 451; *Mann v. Cassidy*, 1 Brewst. 60; *Chadwick v. Melvin*, Bright. Elect. Cas. 256.) Thoughtless interference by outside persons with the election officers is not ground for setting aside the election. (*Boileau's Case*, Bright. Elect. Cas. 268; *Skerrett's Case*, Bright. Elect. Cas. 320; *Sprague v. Norway*, 31 Cal. 173; *Dale v. Irwin*, 78 Ill. 170.) Nor do mere irregularities or omissions to observe directory provisions of law. (*Gilleland v. Schuyler*, 9 Kan. 569; *Sprague v. Norway*, 31 Cal. 173; *Sudbury v. Stearns*, 21 Pick. 148; *Weeks v. Ellis*, 2 Barb. 320.)

Smith & Smith and John T. Morgan, for Respondent.

Immaterial issues, or those rendered immaterial by the facts found, need not be found. (*Estate of Wooten*, 56 Cal. 326; *Porter v. Woodward*, 57 Cal. 535; *Whiting v. Townsend*, 57 Cal. 519; *McCourtney v. Fortune*, 57 Cal. 617; *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159; *Roberts v. Haley*, 65 Cal. 397, 4 Pac. 385.) There must be a total deficiency in evidence, or such great preponderance as to show passion or prejudice, to warrant the setting aside of a verdict or finding. (*Glenn v. Arnold*, 56 Cal. 631; *People v. Manning*, 48 Cal. 335; *Bensley v. Whipple*, 57 Cal. 267.) If there is any evidence to support the finding, it will not be disturbed. (*Lick v. Madden*, 36 Cal. 213, 95 Am. Dec. 175; *Hill v. Smith*, 32 Cal. 167; *Wilson v. Fitch*, 41 Cal. 363; *Cox v. Stage Co.*, 1 Idaho, 376; *Trenor v. Railway Co.*, 50 Cal. 222.)

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Opinion of the Court—Beatty, C. J.

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BEATTY, C. J.—At the general election, held in November, 1888, the parties to this action were opposing candidates for the office of sheriff of Bingham county, to which the appellant was declared elected. The respondent in pursuance of our statute for "Contesting Certain Elections," beginning with section 5026, commenced this action of contest, alleging as the grounds thereof: 1. Malconduct of the board of judges of election in Rexburg precinct, in said county; and 2. That illegal votes were cast in said precinct, and counted for appellant. At the trial of the cause, when respondent closed, appellant interposed his motion for nonsuit, which being overruled, he proceeded with the introduction of his testimony. By the judgment of the court the respondent was declared elected to said office, and the appellant here asks its reversal.

All the alleged errors complained of by appellant may be considered under the following subdivisions: 1. That the court erred in overruling his motion for nonsuit because respondent's testimony was insufficient to warrant a judgment in his favor; 2. That the findings do not support the judgment; 3. That the court failed to find on all the issues raised; and 4. That the judgment is not warranted by the facts and the law.

The consideration of these questions has required an examination of perhaps the most voluminous record that has ever been submitted to the review of this court, and it has been found a most onerous duty to comply with the closing suggestion of appellant's brief, in which he "commends it to our careful attention and thorough consideration." We earnestly urge a closer observance of the provisions of our statutes which forbid the incumbering of the record with "redundant and useless matter." Even when an appeal is taken, upon the ground of the insufficiency of the evidence, it is entirely unnecessary to incorporate all that has been said by witnesses, including questions and answers. The statute will protect the appellant who inserts in his record, in narrative form, only such evidence as is pertinent to the material issues, and procures thereto the proper certificate of the judge, showing that all such evidence is included.

Motion for nonsuit, on account of insufficiency of evidence, is waived by the subsequent introduction of testimony by the

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mover. Did the court err in overruling the motion for nonsuit? The motion, as above stated, was based upon the alleged insufficiency of the evidence. In the determination of this question, examination of the testimony is unnecessary, for any error the court may have made in this matter was entirely waived by the subsequent introduction of appellant's testimony. It is so settled by the highest authority, to which, for the justification of our ruling, we refer. (*Bradley v. Poole*, 98 Mass. 179, 93 Am. Dec. 144; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; and *Insurance Co. v. Cranford*, 120 U. S. 530, 7 Sup. Ct. Rep. 685.)

Do the findings support the judgment? The appellant claims the findings do not justify and support the judgment. It is admitted they would be more satisfactory if more specific, but, being "proceedings" under our statute, they must likewise be liberally construed. They are, in effect, that "the judges of said election in said precinct permitted legal voters to be arrested, intimidated, and prevented from voting"; "that they permitted legal voters to be arrested for challenging illegal voters"; "that they permitted a large number of persons, whom they suspected were illegal voters, to vote without challenge"; "that they themselves were terrorized by threats of arrest, if they challenged illegal votes"; "that one of the clerks was violently arrested and taken away because he had challenged illegal votes"; "that they conducted the election almost the entire day without any election register"; "that they and others were intimidated and prevented from challenging any person offering to vote by armed men who were sent there from without the precinct by the United States marshal." Our statute does not define what constitutes malconduct of the officers of election, but it must be held that any proceedings which result in unfair elections, that deprive the qualified elector of the opportunity of peaceably casting his ballot and having it counted as cast, or that permit illegal votes to be cast and counted, are within the statutory provisions. Section 570 of our statutes directs that the judges of election must challenge any person offering to vote whom they know or suspect not to be qualified; also it is required the "election register" must be at the polls. That the judges themselves were intimidated

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does not justify such conduct on their part as results in an unfair election. The design of the law is that the election shall be so conducted as to result in the free expression of the legal voters' will. If this fails, from any conduct on the part of the judges, regardless of the cause, the law is not fulfilled. It cannot be doubted, from these findings, that the election was irregular in the highest degree. The findings further show that those irregularities procured the appellant to be declared elected, when he had not received the highest number of legal votes; that illegal votes were cast for him; that, if the illegal votes cast and counted for him were deducted from his total vote, it would leave him with fewer legal votes than respondent had; and upon these findings the court rendered judgment that defendant was elected to the office, and appellant was not, which we think they fully sustain.

Were all necessary findings made? The appellant's next assignment of error is that the court did not find upon all the issues. This question seems for the first time to be suggested in his argument, as the record does not disclose that he asked any additional findings, or excepted to those found as insufficient, or made any objection whatever. It is noted that his objection now is not to a failure to find on all material, but on all, issues raised in the case. By numerous decisions it has been held that findings must be made upon all material issues, but even this ruling is modified in various ways; as that, "when the court fails to find on a material issue, . . . judgment will not be reversed if the finding must have been adverse to the appellant." (*Hutchings v. Castle*, 48 Cal. 156; *People v. Center*, 66 Cal. 564, 5 Pac. 263, 6 Pac. 481; *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 65, 7 Pac. 123.) Also, if the facts found sustain the judgment, there is no necessity to go further, and find on other issues (*Roberts v. Haley*, 65 Cal. 402, 4 Pac. 385); and this court has said: "It must be held that all questions put in issue, and not found upon, would have been found against the appellants, or they were deemed immaterial." (*Gamble v. Dunwell*, 1 Idaho, 271.) However, the question before us is not the establishment of a rule for the formulation of findings, but was it necessary in this case to find others than those in the record? This is solved

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by the pleadings themselves. The findings made are almost in the language of the allegations in the complaint, and substantially responsive to all thereof, while the answer simply denies those allegations, and hence raises no additional issue. It is held by numerous authorities that findings which follow the language of the pleadings are sufficient; and, these being responsive to all the material issues tendered by the pleadings, we deem others are unnecessary.

Is the judgment sustained by the evidence? The only remaining question for consideration is whether the testimony is sufficient to justify the decision of the trial court. The reversal of a judgment on this ground must be only upon clear and convincing evidence that the court erred in its conclusion. In *Ainslie v. Printing Co.*, 1 Idaho, 643, it is held that, whenever "there is a substantial conflict in the testimony, it will not disturb the verdict or the decision of the court below." Other courts have gone even further, and by abundant authority it has become the established rule to sustain the conclusion of the trial court, unless it appears it is supported by so little evidence, and contradicted by so much, that it must be inferred it was reached through passion or prejudice. We will briefly consider the testimony concerning, first, the alleged irregularities of the election; and, second, the rejection by the court, as illegal voters, of those persons who claimed to have withdrawn from the Mormon church just prior to the election.

It was claimed in argument that the deputy marshals were there in pursuance of law, and only for the purpose of preserving the peace and purity of the ballot-box. Attention has been directed to the chapter on the "Elective Franchise," commencing with section 2002 of the Revised Statutes of the United States, as containing the authority under which the marshal acted. The only section therein at all relevant provides that "when an election at which representatives or delegates to Congress are to be chosen is held in any city or town of twenty thousand inhabitants or upward, the marshal shall, on application in writing of at least two citizens residing in such city or town, appoint special deputy marshals." No power under this section is given for such appointment, the place not having the necessary population. Section 2023 pro-

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vides that, when an arrest is made, "the person so arrested shall forthwith be brought before a commissioner, judge, or court of the United States for examination." Instead of the record showing any compliance with this provision, it appears therefrom that most of the parties arrested were simply held as prisoners until the polls closed, and were then discharged. This being so, the marshals, instead of upholding the law, were, in its name violating the rights of citizens. It is also in testimony that they were armed; that in a threatening manner they dictated how the election should be conducted; that they arrested and carried away those who were peaceably and lawfully challenging those suspected of being illegal voters; that they arrested election officers; that unauthorized persons that day registered illegal voters, who were permitted to vote; that part of the time the necessary election books were not at the polls—all of which is disputed by other witnesses, who further testified that other persons, representing the opposite party, were there with a large number of warrants, with the design of intimidating registered voters by arresting them. From this mass of conflicting testimony the court undertook to sift the truth, and, from the record and statements made in argument, it appears the court concluded the election was attended with such irregularities as to wholly vitiate it, and it set the poll aside. With such a conflict in the testimony it cannot be concluded the court erred, but, on the contrary, the testimony shows the election was a farce. It was a scramble between contending parties, in which the law was ignored. The indulgence of such methods would speedily convert the beneficent power of the ballot into an engine of fraud and lawlessness. The lower court properly treated it as void, and set the returns aside, which is justified by the law as well as the facts. McCrary on Elections, second edition, sections 302, 416, lays down the rule that when there are such irregularities, and disregard of the law, as that the real expression of the legal voters is not had—when the true result cannot be ascertained by the returns—the poll must be set aside; but he adds: "It does not follow that legal votes cast at such poll must be lost. They may be proven by secondary evidence . . . [the poll being primary], and, when thus proven, may be counted." Other



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authorities sustain the view, which we see no reason to condemn. In this case, the court, having treated the election as irregular and invalid, permitted the parties to produce those who had voted, and by inquiring into their qualifications, and how they voted, ascertain the true result. This examination involves one of the questions most complained of by the appellant. A large number of those who had voted for him had been members of the Mormon church, and shortly prior to the election had, in form, severed their connection therewith. Appellant insists this was done in good faith; that they thereby became qualified electors, and, having been registered as such, were entitled to vote; that the court, if it inquired into their qualifications, was bound to so hold, because they were no longer members of that proscribed organization.

There can be no doubt of the court's power, in a case of an election contest, to inquire into the qualification of those who voted, and reject all disqualified. If in this case it found the alleged withdrawal from the church by those parties was a mere form—a pretense to avoid the letter of the law—and that, in faith and practice they still adhered to such organization, it would be justified in rejecting them as legal voters. These persons were before the court, and from their own statements and the facts of the case we may judge them. A very large number withdrew on the same day, and all within about two weeks immediately prior to the day of election. They say this was absolutely without counsel or advice from anyone, and generally without knowledge that others were doing the same. In most of the cases it was done by a written resignation, which each claimed he had written out himself. Yet appellant, in his brief, says these withdrawals were by "notices in writing, and in substantially the following forms." Then follows the form. It is most remarkable that so many persons, at about the same time, but without instructions or concert of any kind, should sever their association with this organization in a form of words so similar that appellant can reproduce what he alleges is substantially the form used. They also testified their reason for leaving the church was their desire to vote, and be endowed with all the privileges of American citizenship; that, while they had, two years prior, been denied the privilege of voting

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for the same reason, they had not until shortly before the last election been impressed with the gravity of the situation, and that the desire to change their *status* came upon them rather suddenly. While claiming they had acted in good faith, most of them admitted they still wore their "endowment garments." The general explanation of this was, they would wear them until they wore out, but one explained, "they will wear never out." Should it prove true that they acted in good faith, we will much regret our present doubts. Gladly would we see them in the enjoyment of all the rights accorded to American citizenship, but only through voluntary allegiance to the government, and full obedience to all its laws. In view of all the testimony, we must conclude, with the court below, that those people did not act *bona fide*; that such withdrawals resulted from a concert of action, most likely through the counsel of their leader, and for the sole purpose of evading the law; and that they were not entitled to vote. Even should the evidence in the record justify a reversal, we would be precluded therefrom by another fact contained therein. On page 654 it is certified that testimony, in the form of exhibits, used by the parties at the trial, is not included in the record, and respondent claims it is important. There is no certificate of the judge showing that the omitted testimony is immaterial. Without all the material testimony upon all material issues, it cannot be found the evidence is insufficient to support the decision of the lower court. Its judgment is therefore affirmed.

Berry and Sweet, JJ., concur.

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Argument for Appellant.

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(February 12, 1890.)

## TERRITORY v. NELSON.

[23 Pac. 116.]

APPEAL from District Court, Bear Lake County. Following case of *Territory v. Evans*.

Smith & Smith, for Appellant.

R. Z. Johnson, Attorney General, for the Territory.

BEATTY, C. J.—This cause involves the same question disposed of in *Territory v. Evans*, post, p. 658, 23 Pac. 115, and both causes were heard and considered together. Upon the authority of the other case, it is ordered the judgment in this be set aside, and the indictment be dismissed.

Berry and Sweet, JJ., concur.

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(February 24, 1890.)

## TERRITORY v. EVANS.

[23 Pac. 232.]

JURORS — QUALIFICATIONS OF.—A juror must have all the qualifications now prescribed for an elector, and a member of the so-called Mormon church cannot be a juror.

SAME—CHALLENGE IN CRIMINAL CASES—EXCEPTIONS.—No exception is by statute allowed to an order overruling a challenge to a juror for general cause; hence, such order is not error.

DEPOSITIONS IN CRIMINAL CASES.—Depositions taken in the presence of the accused may be used on trial, when on account of death or other good cause, the presence of the witness cannot be had; our statutes do not forbid such use, nor is it in violation of sixth amendment to the constitution of the United States.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

Smith & Smith, for Appellant.

A person is not competent to act as a juror if he be not an elector of the county. (Rev. Stats., sec. 3941; *Sampson v.*

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*Schaffer*, 3 Cal. 107.) A memorandum or deposition taken before an examining magistrate is not competent evidence against the defendant upon trial. (*State v. Thomas*, 64 N. C. 74; *Jackson v. Commonwealth*, 19 Gratt. 656; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *People v. Chung Ah Chue*, 57 Cal. 567.)

Richard Z. Johnson, Attorney General, and Hawley & Reeves, for the Territory.

A decision upon the challenge for actual bias is not the subject of exception or review on appeal. (*People v. Taing*, 53 Cal. 602, 603; *People v. Riley*, 65 Cal. 107, 108, 3 Pac. 413; *People v. Cotta*, 49 Cal. 169.) Where a witness fails to appear at the trial of the cause, but has previously, either on a former trial or at the preliminary examination of the accused, given evidence in the cause, and the defendant has had an opportunity to cross-examine him, his deposition, or proof of the testimony given by him, can be admitted as evidence. (*State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435; *Summons v. State*, 5 Ohio St. 325; *Sneed v. State*, 47 Ark. 180, 1 S. W. 70; *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *Brown v. Commonwealth*, 73 Pa. St. 321, 13 Am. Rep. 740; *Barnett v. People*, 54 Ill. 325.) All omissions in the bill of exceptions are to be construed against the party presenting it. (*People v. Williams*, 45 Cal. 25; *People v. Marks*, 72 Cal. 47, 13 Pac. 149; *People v. Huff*, 72 Cal. 119, 13 Pac. 168.)

BEATTY, C. J.—The appellant was charged with the offense of resisting an officer. From the judgment rendered upon his conviction thereof he has appealed to this court, and now contends that the trial court erred (1) in admitting as a trial juror a person “who was a member of an organization that taught . . . its adherents . . . to commit the crime of bigamy or polygamy”; and (2) in admitting as evidence before the trial jury the depositions of witnesses taken before the committing magistrate.

Must a juror have all the qualifications of an elector? Whether a juror must have the same qualifications now required

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of an elector is the question involved in the first assignment of error. Sections 3941 and 3942 of the Revised Statutes together provide that jurors must be citizens of the United States and electors of the county. Sections 500 and 501 require that electors, besides having certain qualifications, must not be members of any "organization which teaches its adherents to commit the crime of bigamy or polygamy." While these statutes seem clearly to exclude as jurors all persons who belong to such "organization," it is contended such a construction will do violence to the legislative will and intention, for which the reasons following are assigned: 1. That when the law first provided a juror should be an elector (Laws, 8th Sess., p. 704), the only qualifications of an elector were citizenship and residence, and, in changing the qualification of electors (13th Sess., p. 106), by requiring they must not belong to said organization, it was not designed to apply this restriction to jurors also; 2. That, if jurors must have all the qualifications of electors, they must also be registered, which, under the operation of the registration law, would often result in the temporary exclusion of good citizens as jurors, who are otherwise qualified electors; and 3. That in some counties in this territory so many of the people are members of such organization that the courts would thus be practically without jurors.

1. The authorities holding that statutes will not be repealed by implication are not applicable to general laws which are in conflict with, and repugnant to, each other. When a general law is in apparent conflict with some prior private or special act, passed for the benefit of some particular interest or municipality, the presumption is indulged that it was not designed by the general to repeal the special law; but no such presumption is entertained in the case of conflicting general statutes. They cannot stand together. There can be no question that the two statutes prescribe different qualifications for electors, and the older must yield to the later. It may be added that the act of the thirteenth session was an election law, and by its last section it not only expressly repealed the former law on the same subject, but also "all acts or parts of acts in conflict with this act," which must be held to exclude any presumption that the legislature did not intend the repeal of all

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conflicting statutes. However, the fact that on the eleventh day of January, 1887, the legislature, by one act, swept out of existence all former legislation and laws of Idaho, and enacted a complete revision thereof, now embodied in our Revised Statutes, including sections 3941 and 3942, as they now are, is sufficient answer to all suggestions that the legislature did not intend the statutes as they now read. One of the prime objects of a revision is the elimination of doubt. What is included therein must be construed together as the law, and all that formerly existed, and not included, is clearly repealed. (Rev. Stats., sec. 19.)

2. It is not conceded an elector must be registered to act as a juror. Section 500 says he must be registered to vote. It does not follow that, if he has all the qualifications of an elector, he must be registered, to sit in the jury-box. Registration does not go to his qualification, but is only a precaution to prevent fraud in the election. But, even if the law should be construed that a juror must be registered, it would generally result in only a few being temporarily debarred the privilege of jurors.

3. It is, unfortunately, true that in some counties such a large proportion of the people belong to said "organization" that juries cannot be selected from the mass of the people, and courts may at times find it even inconvenient to procure them. So, also, communities might be found where the qualification of citizenship, or any other general qualification, might result in the same inconvenience. On the contrary, we think the legislature meant to exclude from jury service those belonging to the so-called "Mormon church." By section 501 they are distinctly enjoined from "holding any position or office of honor, trust or profit." Laws are construed in the light of the facts and circumstances under which enacted. We are justified in supposing the lawmaker took notice of the generally admitted fact that the members of that church are more obedient to its teachings, which are antagonistic to the laws of the land, than to the latter. View this question in any light, we are forced to the conclusion that under our laws a juror must have all the qualifications now required of an elector, and that the court should have excluded the juror objected to by appellant.

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That this conclusion will lead to inconvenience in some localities may be true, but we cannot change what seems to be a positive and clear statute. If there is any need of a change, we respectfully refer it to the legislative department.

*Exception to Order Overruling Challenge for General Causes:* Respondent insists, however, that, even if the juror was not qualified, the statute does not allow appellant an exception to the order of the court overruling his challenge to such juror. Inconsistent as it may appear, it seems such is the statute. Section 7831 divides causes of challenge to jurors into (1) general, including "a want of any of the qualifications prescribed by law to render a person a competent juror" (section 7832) and (2) particular, which includes implied and actual bias (section 7833). The cause of challenge in this case was a general cause; and the statute in no place provides for or allows an exception to an order overruling such a cause of challenge. Our section 7940 (Cal. Pen. Code, sec. 1170), allows exceptions only in matters of challenge based on implied or actual bias. Here, then, we have a statute which declares a juror disqualified, but provides no remedy to the aggrieved party when the court admits him. On the principle that there is a remedy for all wrongs, we would be inclined to hold that such action of the court is reviewable. But our statute on this subject is an exact copy of that of California, and in adopting their laws we adopt also their construction of them. Partially in point is the case of *People v. Riley*, 65 Cal. 107, 3 Pac. 413, and cases cited, which hold that a defendant is not allowed an exception to the ruling of the court disallowing a "challenge for actual or implied bias," because the statute makes no provision for such exception, but only allows it to the decision of the court "in admitting or rejecting testimony, or in charging the triers in the trial of a challenge to a juror for actual bias." The direct question is decided in *People v. Fong Ah Sing*, 70 Cal. 8-11, 11 Pac. 323, being a cause in which defendant was found guilty of murder. A juror who was not a resident of the county, as required by law, was admitted against defendant's challenge. On appeal it was held this was a general cause of challenge to rulings in which no exception is allowed. The case seems approved in *People v.*

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*Ward*, 77 Cal. 113, 19 Pac. 373. We therefore hold the appellant's exception to the order of the court overruling his challenge to the juror is not well taken.

*Depositions may be Used on the Trial*: Was it error to admit in evidence the depositions referred to in the cause? Appellant claims it was, because not permitted by the statute, and contrary to the constitution of the United States. Under the common law, the depositions of witnesses, taken in the presence of the defendant, could be used at the trial of the cause in case of the death or absence of the witness, but it seems they could not be used before the grand jury. Does our statute abrogate the common-law rule, or prohibit the use of depositions? Sections 7576 and 7634 provide for the taking of the depositions, and their use before the grand jury. It seems probable these provisions were designed to procure the testimony of witnesses while it is fresh in their minds, and also in the interest of economy and convenience. The question of testimony before the trial jury was not under consideration. The two questions are not sufficiently relevant that the consideration of one necessarily involves the other. It is evident this legislation referred only to the use of such evidence before the grand jury; for it provides for its use even when the presence of the witness can be procured, which is never permitted in the use of such testimony before the trial jury. The subjects not being relevant, failure to provide for its use before the trial jury does not operate to exclude it. Our statutes expressly establish and recognize the principle of the use of depositions on the trial in certain cases, of the absence or death of the witness. Stats., secs. 7588, 8161.) Then why not in all cases, if not expressly forbidden? Section 8161 provides expressly for the taking of depositions of defendant's witnesses for use on the trial, and the fact that no provision is made therein for taking the deposition of the people's witnesses strongly suggests that it was designed they should not be used. But it does not appear we have abolished the common-law rule on this subject, nor have we directly enjoined the use of such testimony; and it does appear that all the depositions above referred to are taken in the same way, in the presence of the accused, thus justifying the presumption of a like use of all so taken; and section 7864



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provides that "the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." There is no doubt this is a question relating to "the rules of evidence," nor is there that depositions may be used in civil actions. We think our statute permits their use before the trial jury when duly taken in the defendant's presence, and the witnesses cannot, for good cause, be brought before the court.

*The Use of Depositions not Forbidden by United States Constitution:* It remains to consider whether article 6 of the amendments to the constitution of the United States, providing that the accused must be "confronted with the witnesses against him," absolutely requires the presence of the witnesses at the trial. This question has been discussed time after time in the courts of the states having the same or similar constitutional provisions; and, while the decisions have not been uniform in their conclusions, the weight of authority is that depositions taken in the presence of the defendant, with the right of cross-examination, is being "confronted by the witnesses," and meets the demands of the constitution. Such depositions have been admitted when it appeared the witness was dead. If constitutional in such case, the same justification can be urged for their use in case of absence of the witness. Of the many authorities sustaining this view are *State v. McO'Blenis*, 24 Mo. 412, 69 Am. Dec. 435, a murder case, in which depositions were allowed notwithstanding a constitutional provision that "in all criminal prosecutions the accused has the right to meet the witnesses against him face to face." *Summons v. State*, 5 Ohio St. 340, was a murder case. The constitutional provision was: "In any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face." The testimony of a witness given in a former trial was permitted to be testified to by those who heard it; the witness having in the meantime died. To same effect are *Gilbreath v. State*, 26 Tex. App. 318, 9 S. W. 618; *Sneed v. State*, 47 Ark. 180, 1 S. W. 70, and numerous authorities. Had the depositions been improperly admitted, the appellant has failed to furnish the court such a record as will authorize it to correct the error. Section 8236 is: "Neither a

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Argument for Appellant.

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departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." The appellant has entirely failed to show us he was prejudiced in the least by the alleged error of permitting the use of the depositions. That the court may judge whether they were detrimental to appellant, he should have brought them here, which he has failed to do. It is not enough for appellant to show error. He must, under our statute, show damaging error. Under the plain provision last noted, we do not need the guide of other courts to lead us to this conclusion; but in harmony with it are *People v. Brotherton*, 47 Cal. 388, *People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254, and cases cited, and *People v. Olsen*, 80 Cal. 122, 22 Pac. 126. The judgment in this cause should be and is affirmed.

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(February 12, 1890.)

## TERRITORY v. EVANS.

[23 Pac. 115.]

CONSTITUTIONAL LAW—SHIPPING DAMS, NETS, SKINES, FISH-TRAPS, ETC., OUT OF THE TERRITORY—COMMERCE BETWEEN STATES.—Section 7193 of the Revised Statutes of Idaho, prohibiting the exportation of fish from this territory, being in conflict with section 8, article 1, of the constitution of the United States, providing for the regulation of commerce between the states, is void.

(Syllabus by the court.)

APPEAL from District Court, Second District.

Hawley &amp; Reeves, for Appellant.

Penal statutes must be construed strictly, and cannot be extended by implication, or beyond the legitimate import of the words used. (*United States v. Gooding*, 12 Wheat. 460; *Rawson v. State*, 19 Conn. 299; *Martin v. Hunter*, 1 Wheat. 326; *People v. Tisdale*, 57 Cal. 104; *Stuart v. Allen*, 16 Cal. 473,

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76 Am. Dec. 551; *Hankins v. People*, 106 Ill. 628; *Pacific v. Seifert*, 79 Mo. 210; *Chase v. Railroad Co.*, 26 N. Y. 523.) Our legislative assembly may perhaps be able to entirely prohibit by statute the catching or transportation of fish, as a proper exercise of the police powers of the territory, but cannot make it lawful to transport and sell fish within the territory and a crime to do so beyond its boundaries. (*In re Barber*, 39 Fed. 641; *Harvey v. Huffman*, 39 Fed. 646; *Swift v. Sutphin*, 39 Fed. 630; *Gibbons v. Ogden*, 9 Wheat. 1; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; *Ward v. Maryland*, 12 Wall. 418; *Henderson v. Mayor*, 92 U. S. 259; *Mugler v. Kansas*, 123 U. S. 623, 8 Pac. 273; *Railway Co. v. Husen*, 95 U. S. 465; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *In re Watson*, 15 Fed. 511; *Smith v. Turner*, 7 How. 283; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091.)

Richard Z. Johnson, Attorney General, for the Territory.

BEATTY, C. J.—The appellant, Thomas Evans, was indicted with George Rae for a violation of section 7193 of the Revised Statutes of Idaho, which, as amended by act of the fifteenth legislative assembly, reads: "It is unlawful for any person in this territory to make any dam, or use any nets, seines, fish-traps, or any similar device or measures for catching fish, or to ship the same out of this territory for speculative purposes." The appellant, Evans, alone, was tried upon this charge, and from the judgment rendered against him upon his conviction thereof he has appealed to this court. While the record contains various specifications of alleged error, the appellant has in his argument of the cause referred to but two, viz.: That the statute does not prohibit the exportation of fish, and, if it does, it is in violation of section 8, article 1 of the constitution of the United States.

It is true the statute does not read as it undoubtedly was intended it should, and it is surprising that it passed unchallenged the ordeal of six readings in the presence of careful legislators. Construed as it reads, it prohibits the exportation from this territory only of dams, and the use of nets, fish-traps, and other devices for catching fish, and not the fish themselves.

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As dams cannot be shipped, and the use of a thing is an incorporeal right, this statute, if construed by its words, undertakes to prevent the performance of an impossibility, hence, in effect, is void. Conceding, however, that it may be construed to prohibit the exportation of fish, as the legislature undoubtedly designed it, is it in violation of the section referred to of the supreme law of the land? This question was involved in the court below, in the demurrer to the indictment, on the exceptions to the instructions, and in the motion for arrest of judgment, and is saved by appellant's exception to the ruling of the court in those matters. The provision of section 8, article 1 of the constitution of the United States, that "Congress shall have power . . . to regulate commerce with foreign nations and among the several states," having been so frequently and fully considered by the ablest, including the highest courts in the nation, it will not be expected we shall, to any length, now attempt its discussion. It is clearly settled and conceded by all, that the above provision of the constitution confers upon Congress the exclusive power to regulate commerce between the states, and any statute which attempts to prohibit the shipment into or out of a state of any lawful commodities or articles of commerce or trade is in conflict therewith, and necessarily void. To each state is reserved the power of regulating commerce within its borders, but not that extending across its boundary lines. The state may also, under its police power, enact such laws as are necessary to the protection of the lives, the health and comfort of its citizens, and for the promotion of good order within its limits. But whenever, under the pretense of an exercise of its police power, the state enacts any statute which operates to prevent the free exchange between the states of lawful articles of trade, it is void because in conflict with that constitutional provision. This is clearly illustrated in a number of recent and interesting cases. *Railroad Co. v. Husen*, 93 U. S. 468, is a case in which the state of Missouri, under the claim of exercising its police prerogative, and to prevent the spread of contagious cattle disease in the state, enacted a statute forbidding the unloading of Texas cattle within the state, but allowing their passage through it on board of cars or vessels. The court held that

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cattle were subjects of lawful commerce, and could not be excluded, except when diseased; that the statute practically operated, not in the exclusion of diseased cattle alone, but of all Texas cattle, and was void. The business of butchering cattle, and shipping the dressed fresh meat into the surrounding states from the place of slaughter, has in recent years become an important pursuit, but one which came in conflict with local dealers. To prevent this, statutes were enacted in several of the western states, purporting to be in pursuance of their police power, and to promote the health of their inhabitants by preventing the importation of diseased meat. They required that all animals should be inspected within twenty-four hours before their slaughter, and the sale of meat of animals not so inspected should be prohibited. The courts have uniformly held that such statutes are not within the police power of the state, and that, whatever their design, they operate as a prohibition to the importation of dressed meat, which is a lawful article of trade, and whenever these statutes have come before the courts for consideration, they have been held void. The following cases on this subject will be found of interest, and in them the whole subject is fully reviewed: *Swift v. Sutphin*, 39 Fed. 630; *In re Barber*, 39 Fed. 641; *In re Christian*, 39 Fed. 636; *Harvey v. Huffman*, 39 Fed. 646; *Ex parte Kieffer*, 40 Fed. 400. In the state of Indiana a statute prohibiting the exportation of natural gas from the state through pipes has, upon the same principle, recently been held void. The state of Kansas has had a statute to prevent the shipment therefrom of fowls and other game. For a violation of this, an express agent was indicted for shipping to Chicago four prairie chickens. The act only prevented the exportation of chickens, and did not prevent their capture and use by the denizens of Kansas, but seemed rather to preserve them for their exclusive use and comfort. It was held void in *State v. Saunders*, 19 Kan. 128, 27 Am. Rep. 98. By the law of this territory we recognize fish as a lawful article of trade. The statute only attempts to preserve them for us, and to deprive our neighbors of their use, which, in the light of the authorities, we must conclude is in violation of the constitutional provision referred to, and therefore void. It follows that the demurrer to the

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Argument for Appellant.

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indictment above referred to should be sustained, and it is therefore ordered that the judgment appealed from be set aside, and the indictment dismissed.

BERRY, J.—I concur that the act, so far as it prohibits the shipping of fish out of this territory for speculative purposes, is unconstitutional. I think the statute is not against the shipping of dams, etc., but is against shipping of fish only.

Sweet, J., concurs.

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(February 24, 1890.)

FURY, SHERIFF, v. WHITE ET AL.

[23 Pac. 535.]

SHERIFF.—Where a sheriff levies on personal property under attachment, and while holding under such levy received a second attachment and levies on the same property under the second attachment, and afterward, but before sale on either, a third person claiming the property, the second attaching creditor indemnifies the sheriff against loss under the second attachment, and the sheriff sells under execution in the first attachment suit and pays all proceeds to the first attaching creditor, the claimant of the property having recovered of the sheriff the value of the property sold, held, (1) that the sheriff cannot recover on the indemnifying bond of the second attaching creditor; (2) the complaint not claiming nor the proof showing that after the levy the sheriff did any act under the second attachment, the attaching creditor is not liable; (3) in such case when the plaintiff has rested it is not error for the court to instruct the jury to find for the defendant; (4) in such case, also, the effect of an indemnifying bond must be determined by its own conditions. (Syllabus by the court.)

APPEAL from District Court, Alturas County.

Angel & Sullivan, for Appellant.

The sheriff's right to recover on the attachment bond does not in any manner depend upon the question whether the giver of the bond was benefited or not by the seizure and sale,

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nor upon the fact whether he received any part of the money for which the property was sold. (*Weber v. Ferris*, 37 How. Pr. 102; *Herring v. Hoppock*, 15 N. Y. 409; *Davidson v. Dallas*, 15 Cal. 75.) The several indemnity bonds were independent securities for the same object, and a sheriff who holds several indemnity bonds for the same object may resort to either at his option. (Brandt on Guaranty and Suretyship, sec. 195; *Muller v. Downs*, 94 U. S. 444.)

Kingsbury & McGowan, for Respondents.

If the evidence is not set out, instructions will be presumed correct if possibly so under any conceivable state of facts. (*People v. Bourke*, 66 Cal. 455, 6 Pac. 89; *People v. Johnson*, 61 Cal. 142; *People v. Smith*, 57 Cal. 130; *People v. Dick*, 34 Cal. 663; *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.) All presumptions are in favor of the regularity of the action of the court below. Error will never be presumed, but must affirmatively appear in the record. (*Gonzales v. Huntley*, 1 Cal. 32; *Lowe v. Turner*, 1 Idaho, 108; *Goodman v. Mining etc. Co.*, 1 Idaho, 131; *Folsom v. Root*, 1 Cal. 374; *Hazard v. Cole*, 1 Idaho, 276-282; *People v. Baker*, 1 Cal. 404-406.)

BERRY, J.—Previous to June 21, 1883, the plaintiff, as sheriff of Alturas county, holding two writs of attachment from the probate court of that county—one in favor of Donaldson and Young, and another in favor of Bartch and Mills—both issued against one Bolton, levied upon and took into his possession certain personal property as the property of Bolton. After such levy, and while such property was in his possession, the defendant White, on the twenty-first day of June, placed in the hands of the sheriff a third writ of attachment in his favor, against said Bolton. The answer of White alleges that the sheriff, having such property in his possession, attached to this said writ a schedule of such property, and indorsed thereon that he had levied on the property under said attachment. Aside from this admission by White, there is no evidence of such levy under White's attachment.

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It appears that afterward, the property being claimed by one Braden, an assignee for the creditors of Bolton, a bond of indemnity, dated June 22, 1883, was given to the sheriff by the defendant White as principal, with the defendants Riley and Fox as sureties. That bond is the subject of the action at bar. Its conditions are "that if the obligors shall well and truly indemnify and save harmless the said Fury, sheriff," etc., "of and from all damages, expenses, costs and charges, and against all loss and liabilities, which he, the said Fury, as sheriff," etc., "shall sustain, or in any wise be put to, by reason of attachment, seizing, levying, taking or detention by the said sheriff, in his custody, under said attachment [the attachment of White against Bolton] of said property claimed [by said Braden] as aforesaid, then the above obligation to be void."

The case is presented on bill of exceptions; the only exception being to the charge or direction of the court to the jury to find a verdict for the defendant. The appellant, in his brief, states "that on the sixth day of December, 1887, this cause came on for trial before a jury, and the evidence showed that the property described in said indemnity bond had been levied upon under prior attachments which had been served by the plaintiff as sheriff, and was sold under said prior attachments, and not under the attachment in the case in which said indemnifying bond was given, and the appellant admitted that the defendant, E. A. White, received no part of the money for which said property was sold; that thereupon the defendants moved the court to peremptorily instruct the jury to bring in a verdict for the defendants, which motion was sustained by the court, and the jury was thereupon instructed to, and did, bring in a verdict for the defendants." To this ruling and instruction the plaintiff excepted.

The arguments upon the hearing in this court have been mainly based on the decision in *Davidson v. Dallas*, 8 Cal. 227, holding that where property is seized under two attachments, and the property is claimed by a third person, and both attaching creditors indemnify the sheriff, who goes on and sells it and pays the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterward the party claiming the property recovers judgment against the sheriff



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Opinion of the Court—Berry, J.

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for the value of the property, the recourse of the sheriff is only against the first attaching creditor, for whose benefit the property was sold; and the same case, 15 Cal. 75, in which, while the former decision is affirmed for that case, its doctrine is commented upon and doubted. But we do not find it necessary, in this case, to enter into that question. The case at bar is widely different from that, and the action of the court below may well have been based on other grounds than upon the doctrine of that case. A review of this case makes the distinction apparent.

The issue in the court below was as follows: In the probate court the complaint, in substance, sets up: 1. The official character of the plaintiff. 2. Alleges the making of the bond, setting it out in full. 3. "That defendants have failed, neglected and refused, and still fail," etc., "to comply with the conditions of said bond, and to save harmless this plaintiff, to wit, that on," etc., "said Braden [the assignee of said Bolton], mentioned in said bond, assigned to T. E. Picotte all his rights in and to said personal property, . . . and all claims for damages for taking and seizing said property by the plaintiff that had accrued to said Braden, . . . and that said Picotte was entitled to said personal property, and to all damages accruing to said Braden for taking and detention thereof by the plaintiff; that said Picotte, as successor in interest as aforesaid, and as assignee for the benefit of creditors of the said Bolton, on the twenty-fourth day of March, 1884, commenced an action in the district court of said Alturas county, against the plaintiff, to recover the sum of \$2,500, claimed as damages for the taking and detention of said personal property under and by virtue of said writ of attachment." 4. That said Picotte, as such assignee and successor of Braden, recovered judgment against the defendant for damages and costs, \$1,580. 5. That the plaintiff has paid the judgment, and in addition the sum of \$212 in defending the suit. 6. That the plaintiff has demanded of these defendants payment of the penal sum of the bond, which was refused—and closes with a demand for judgment.

The complaint is silent as to any act done, either by seizure, detention or sale of the property, in the suit of White against

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Bolton, or under either of the senior attachments. The defendants answered, putting in issue each allegation of the complaint; and on this issue a trial was had in the probate court, and judgment had for the plaintiff. From that judgment an appeal was taken to the district court in Alturas county, and a retrial was had. Before trial in the district court the complaint was amended by adding thereto the following allegations, to wit: "1. That the damages in said complaint alleged to have been sustained by the plaintiff were sustained by reason of the plaintiff's levying upon and holding the property described in exhibit 'A,' which was the bond in suit; 2. That the judgment in the district court, referred to in the complaint, by T. E. Picotte, as assignee of C. E. Bolton, was recovered against this plaintiff by reason of his having levied upon and detained the property described in said exhibit 'A.'" The levying and detention is not alleged to have been under White's attachment. No sale of the property is alluded to, nor do the defendants appear to have had notice, or to have taken any part in the action by Picotte against this plaintiff. For all that appears, previous to the trial in the district court, the property was still held, as at first taken, by the sheriff, under process "of prior attaching creditors." It is not alleged, nor does it anywhere appear, that there was any privity between those "prior attaching creditors" and the defendant White. The answer puts all the allegations of the amended complaint in issue, and upon these issues the case was tried in the district court, and judgment was rendered for the defendants.

We may here inquire: 1. What were the contract obligations of the defendants to the plaintiff? 2. Was that contract broken by the defendants? And in what manner was it broken? And 3. In what, if anything, was the error of the court in its charge to the jury?

And first: What were the obligations of the defendants? This bond was not strictly statutory, hence its effect is not the subject of statutory construction. It was voluntary, and its effect must be gathered from its own conditions. The statute in view of which a bond might be given, and by reason of which, presumably, this was given, is section 240 of the Revised Laws (8th Sess.) of Idaho, which provides: "If the property

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levied on be claimed by a third person as his property, the sheriff shall summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. . . . If their verdict be in favor of the claimant, the sheriff shall relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon." This is, of course, after judgment has been rendered for the creditor, and execution is issued. But when attached, and before judgment, section 131 provides that "if any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of claim after levy upon execution." As to the validity of these provisions as a means of determining the ownership of property levied upon, or how far such proceedings will protect the sheriff, is a question not here in issue; and we do not intend to intimate any opinion upon it. Yet the statutory preliminary conditions for calling a sheriff's jury seem to have arisen by claim of Braden to the property as assignee of Bolton. But if, under any of the attachments, such conditions existed, it was optional with the sheriff to call or not to call a jury. Had they existed under White's attachment, they must have existed as well under the senior attachments, and the sheriff must have released the liens of such prior attachments, or taken indemnity under them. If he did not dismiss or take indemnity, it was his own fault. In no event, however, as the case stood, did the sheriff have right to demand indemnity from the defendant White. But if he had such right, and had done so, the statute prescribes no form for the bond, and only, if it be under the statute, that it must be "sufficient." The question of sufficiency is left entirely between the creditor and the sheriff. If there were any doubt as to the nature of the instrument in question, the brief of the appellant settles it for this case. It says: "We maintain that the liability of the defendants depends simply upon the terms of their contract with the plaintiff." The bond was then purely voluntary, and must be construed by its own conditions.

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Those conditions are, simply, that the defendants shall save the sheriff harmless from loss or liability which he may incur "by reason of attaching, seizing, levying, taking or retention by said sheriff in his custody, under said attachment, of said property," or under the attachment in favor of White. The acts, then, for which the sheriff was indemnified, were only those done under and by virtue of White's attachment. The defendants, in terms, guaranteed against nothing that was not to be for White's benefit, or acts done by the sheriff on his account. If, then, the sheriff did no act under that attachment causing loss or damage to himself, the defendants incurred no liability.

It must be noticed that there is no allegation in the complaint, nor any evidence alleged as given on the trial, that White's attachment was the reason for anything which the sheriff did. The plaintiff's bill of exceptions avers that on the trial in the district court the evidence showed that the property involved had been levied upon under prior attachments which had been served by the plaintiff as sheriff, and was sold under said prior attachments, and not under White's attachment. The allegation in the answer of White "that plaintiff, as such sheriff, under said writ of attachment, did no act to or with any of said property, nor did the defendant White, or either of the defendants, receive any part of the proceeds of the property," seems to be fully sustained. The appellant contends that it could make no difference whether he did or did not receive benefit. We are not prepared to go so far as that. Were it shown that defendant White did receive benefit, that question might arise; but it does not arise as the case stands.

It is also to be noted that the claim of the plaintiff that he had suffered damage is controverted, and the bill of exceptions refers to no proof that he had sustained damage, or that the judgment alleged in the complaint in favor of Picotte, which is put in issue, was ever, in fact, rendered; nor was there any offer made by the plaintiff to show that fact, or to show any other fact which was not shown on the trial.

At what stage of the trial the request was made by the judge to instruct the jury to find a verdict for the defendants, does not affirmatively appear. Presumably, it was under section

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Opinion of the Court—Sweet, J., Concurring.

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4354, subdivision 5, and section 4385 of the Revised Statutes of Idaho, and when the plaintiff had rested his case, and on statutory motion for nonsuit. The presumption is that the proceedings in the court below were regular till the contrary appears. It was, presumably, a "special instruction," having the effect of a judgment of nonsuit; and given on the ground that "the plaintiff had failed to prove a sufficient case for the jury." It is not apparent to the court that there was any breach of covenant on the part of the defendants. As the case stood, when the court was requested to instruct the jury the judge was fully justified in giving the instructions demanded by the defendants; and the assignment of error on that account cannot be sustained. Judgment affirmed.

BEATTY, C. J.—I do not concur in any part of this opinion which may be construed as holding that a subsequent attaching creditor is not liable on his indemnity bond when he received none of the proceeds of sale of the attached property; but, for other reasons stated therein, I agree the judgment should be affirmed.

SWEET, J.—I concur in affirming the judgment of the court below. The failure of respondent to tender certain proofs renders it impossible for this court to consider or pass upon the legal questions involved at the trial in the lower court. My concurrence, therefore, is based upon the failure of the record to present the real issues involved; and beyond this I express no opinion.

## Statements of Facts.

(February 24, 1890.)

## FIRST NATIONAL BANK OF LEWISTON v. WILLIAMS.

[23 Pac. 552.]

**ACTION ON PROMISSORY NOTE—MORTGAGE TO SECURE NOTE—SURETY—AGREEMENT.**—One Leland and appellant Williams made their joint and several promissory note payable to the order of one Shaw, and delivered the same to him, Williams being a surety, although that did not appear on the face of the note. As an inducement to Williams to sign the note Leland agreed and did execute a first mortgage on real estate to secure the note. Shaw, after the note and mortgage became due, assigned both to one Vollmer, who assigned them to the respondent bank. The respondent now claims the mortgage invalid, as it was not sealed; held, that by statute in force at time of giving the mortgage a seal was not necessary, hence, the mortgage was valid, and an action should have been brought to foreclose the same, and not upon the note alone, as was done, as the security was not valueless.

## APPEAL from District Court, Nez Perces County.

On the thirtieth day of October, 1884, Alonzo Leland and the appellant, M. M. Williams, duly made their joint and several promissory note, payable to the order of one A. J. Shaw, six months after date, and thereafter delivered the same to the payee. The note was given for the debt of Leland, and Williams joined in it at the request of Leland, as surety only, though the fact that he was surety did not appear on the face of the note. To induce Williams to join in the making of the note, it was agreed between Leland and Williams that Leland should give to Shaw, the payee, a first mortgage on real estate to secure the note, so that he (Williams), in case Leland did not pay the note, "would only have the balance to pay that the property did not bring"; which agreement was known to Shaw, and was assented to by him at the time. A mortgage was made, on the 1st day of November, 1884, by Leland to Shaw, acknowledged on the sixth day of the same month, and recorded by said Shaw, in said county, on the next day, the 7th of November, covering one hundred and sixty acres of land therein described, the property of the mortgagor, setting out the note in full, and stating upon its face that it was "intended as a mortgage to secure payment of" this note so set out, and containing the usual power

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Argument for Appellant.

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of sale. Whether the mortgage was delivered at the time of delivery of the note does not appear. On receipt of the mortgage, Shaw reported to Williams that it had been given to him by Leland. A little over three months after the note and mortgage fell due, in Shaw's hands, the latter assigned both note and mortgage to one Vollmer, the president of the plaintiff, who, on the same day, assigned them to his bank, this plaintiff. That, at the time he received the note and mortgage from Shaw, Vollmer discovered that the mortgage was unsealed. The plaintiff brought his action against both the makers upon the note alone, by filing his complaint against both, but did not proceed further against Leland and did proceed to a final judgment against Williams only. The answer, beside stating, in substance, the foregoing facts (all of which appear either in the complaint, or were proven at the trial), contains the following clause: "That after the mortgage to secure the note had been recorded, two mortgages, still valid and existing, have been executed and delivered by said Leland—the first to said Vollmer, and the second to the plaintiff itself—both amounting to \$1,600, covering the same land described in the said mortgage, to secure the note, and were recorded before the commencement of this action; that said two subsequent mortgages are for the full value of said lands, and that said Leland has no personal property not exempt; and that, unless the note in suit be paid from such real estate, this defendant will sustain damage." This clause in the answer was by the court, on motion, stricken out before trial, the appellant excepting to such order. The answer further demands that in case the defendant is held to pay the note in suit, said Williams be subrogated by judgment to the original rights in said mortgage of this plaintiff, and, of course, of said Shaw.

Hawley & Reeves, for Appellant.

The surety is only bound to fulfill the promise in the sense in which the promisee knew at the time the promisor intended it; and it matters not in what way the knowledge of the meaning is brought to the mind of the promisee. (De Colyar on Guaranties, 7, 8, and authorities cited; *Miller v. Stewart*, 9 Wheat. 680.) A surety is always discharged by the laches of the cred-

## Argument for Respondent.

itor; and, should the creditor fail to do anything which he is bound or agreed to do for the protection of the surety, then the surety is discharged. (De Colyar on Guaranties, 432 et seq.; Story's Equity Jurisprudence, sec. 324; *King v. Baldwin*, 2 Johns. Ch. 554; *Watts v. Shuttleworth*, 7 Hurl. & N. 353.) A want of diligence in taking security, or a security worthless by reason of the laches of the creditor, discharges the surety. (*King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Ex parte Mure*, 2 Cox, 63.) Any material variation of the original contract will discharge the surety. (*Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572; *McWilliams v. Mason*, 31 N. Y. 294; *Ham v. Greve*, 34 Ind. 18; *Mellendy v. Austin*, 69 Ill. 15.) Parol evidence may be offered to show the signer of a note is in reality a surety. (*Weston v. Chamberlin*, 7 Cush. 404; *Holt v. Bodey*, 18 Pa. St. 207; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am. Dec. 673; *Core v. Wilson*, 40 Ind. 204; *Hubbard v. Gurney*, 64 N. Y. 457; *McMillan v. Parkell*, 64 Mo. 286.)

T. D. Cahalan and Brumback & Lamb, for Respondent.

If illegal evidence is admitted on the trial, it is not error for the court to refuse to find a fact proven by such evidence. (*Hutchings v. Castle*, 48 Cal. 152; *Campbell v. Buckman*, 49 Cal. 362; *Glascok v. Ashman*, 52 Cal. 420.) Where there is no issue tendered in the pleading upon a material matter, the court or jury will not be presumed to have found on such matter. (*Gifford v. Carvill*, 29 Cal. 589; *Bernal v. Gleim*, 33 Cal. 668; *Bosquett v. Crane*, 51 Cal. 505; *Dilla v. Bohall*, 53 Cal. 709; *Watson v. Cornell*, 52 Cal. 91.) The true test of the sufficiency of findings is this: Would they answer if presented by a jury in the form of a special verdict? (*Breeze v. Doyle*, 19 Cal. 101.) A surety on a note cannot require the security to be exhausted before an action can be maintained against him. (*Allen v. Woodard*, 125 Mass. 400, 28 Am. Rep. 250; *United States v. Hodge*, 6 How. 279; 2 Daniel on Negotiable Instruments, sec. 1328.) Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. (*Campbell v. Robbins*, 29 Ind. 271; *Crocker v. Getchell*, 23 Me. 392; *Prescott Bank v. Caverly*, 7 Gray, 217, 66 Am. Dec. 473; *Kern v. Von Puhl*, 7 Minn. 426 (Gill. 341), 82



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Am. Dec. 105; *Bank v. Smith*, 27 Barb. 489; *Buckley v. Bentley*, 48 Barb. 283; *Mason v. Graff*, 35 Pa. St. 448.)

BERRY, J. (After Stating the Facts.)—The alleged grounds of error, mostly occurring on the trial in the findings of the court, in refusing a new trial, and in the judgment, will more fully hereafter appear. The case was tried by the court without a jury. The evidence received upon the trial was introduced and given without objection. Being so given, the question of its admissibility, if objected to, does not arise. The complaint shows the note to have been past due when transferred by Shaw, the payee, to the president of the plaintiff; that on the same day he transferred it to his bank; and that both transfers were by "assignment." Whatever equities existed in favor of the appellant against the note, or the right to sue upon the note in the hands of the original payee, continued to exist against it in the hands of this plaintiff. It is proper, then, in the outset, to inquire as to the rights of the appellant, as against the original payee of the note. The obligations of Shaw will be considered as equally the obligations of the plaintiff. On the trial, when the plaintiff had rested his case, the appellant, the defendant below, called John P. Vollmer, who testified that he had been president of the plaintiff corporation "ever since the bank was organized"; identified the note; and, on being shown another paper, said: "That is a mortgage executed by defendant Leland to A. J. Shaw, the payee named in this note. I notice there is no seal of party executing it on this mortgage. It is in the same condition, as to execution and acknowledgment, as when I received it from Mr. Shaw. It may have been at the time I had transaction with Mr. Shaw that I noticed lack of seal. I never mentioned or said anything to Williams about there being any defect in the mortgage." Mortgage introduced in evidence by appellant. Alonzo Leland testified: "This is the note executed by me to A. J. Shaw. This is my signature. The other signature is that of Williams. I am principal debtor on the note. Williams signed it as surety only; and it was signed by him on condition that I should execute, to secure the payment of the note, a valid first mortgage upon real property. That was a condition of his signing the note. That condition was known also by Mr. Shaw, the payee of that note, and the agreement was

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assented to by him at the time. It was on those conditions, and under that agreement, that defendant Williams signed the note. That is my signature, and I executed that document, and supposed it to be a mortgage upon the land." M. M. Williams, the appellant, testified: "I am defendant sued in this action. I signed this note as surety only. I signed it on condition and under the agreement that Leland should secure the payment of it by a first mortgage on property, and he would get the money from Mr. Shaw, and I would have only any balance to pay that the property did not bring. Mr. Shaw, the payee, knew of the agreement and condition of my signing the note. I don't know whether the mortgage was executed or not. Mr. Shaw called right away, and told me he had the mortgage upon the land. Mr. Vollmer, nor any officer of the bank, ever told me the mortgage was defective, or said anything about the mortgage."

There was no evidence in any way controverting either of these facts. Each was within the issues made by the pleadings. The judge in his findings, though specially requested by the defendant, refused to find upon either of these facts, except the fact that the mortgage to secure the note was, at Williams' request, given by Leland. To this refusal to find (1) as to the conditions on which the defendant Williams became a maker of the note, also as to the connection of Shaw with that agreement, and signing of the mortgage; (2) as to the condition of the mortgage as to seal, and what lands it was upon; (3) as to the knowledge of the plaintiff, in becoming the successor of Shaw in the ownership of the note—the appellant excepted. This raises the question of the materiality of the issues involved in the points, or any of them, on which the judge refused to find. The description and amount of lands covered by the mortgage are shown in that exhibit, as well as its object to secure this note. The evidence, as we have seen, will warrant findings only as claimed by the appellant. Contrary findings on either point, upon the evidence, could not be made. Those points are: 1. Was Williams only a surety upon that note? 2. Did Shaw, in taking that note, know what relations Williams held to it? 3. And for what purpose the mortgage was executed? And did he become a party thereto, by knowing the agreement between the

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principal and surety on the note, assenting to the agreement, and accepting the mortgage as security for the note? Of course, if he did, he was bound in good faith not to defeat the measures which the appellant had taken for his protection, and which Leland had placed in Shaw's hands as special security for the note. The mortgage security became and was part of the contract between Shaw and the makers of this note. Besides the fact of its being the condition of appellant's signing, the payee of the note held it as a lien on property of the principal debtor, to which it was his duty to look before resorting to the surety on the note. If this were not an elementary principle of law, it became a controlling principle in this case, by virtue of the agreement between the makers, known and assented to by Shaw, and by his act in accepting the mortgage, pursuant to such agreement, together with the note. It is clear that those facts are material to this defendant. The counsel for respondent contends that, where there is no material issue tendered by the pleadings, findings on such matters will not be required. But the amendment to defendant's answer does tender these issues. The matter was material, and evidence was given upon it without objection, and was so submitted to the court as a part of the defendant's case. The authorities are numerous and conclusive that a failure to find upon a material issue, where the same is not in effect waived, but is requested, is error, and ground for reversal. (Hayne on New Trial and Appeal, secs. 239, 240, and cases cited; *Porter v. Muller*, 65 Cal. 512, 4 Pac. 531.)

The appellant further contends that the court below erred in striking out a part of the answer, in effect as follows: "That since the execution and delivery of the mortgage by which the note herein sued upon is secured, and since the recording of said mortgage, that two mortgages, still valid and existing, have been executed and delivered by the defendant Leland—one of said mortgages to John P. Vollmer, president of the First National Bank of Lewiston, plaintiff herein; and the other of said last-named mortgages to the plaintiff herein," aggregating \$1,600 in amount, and "covering the lands herein described" (the lands in the Leland mortgage), "both of which were recorded prior to the commencement of this action"; and that said lands are not

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worth more than sufficient to pay said last two mortgages, etc.; and claiming such act was to the damage of the defendant. It appears by the evidence that the plaintiff claimed the Leland mortgage to be defective, in not having been sealed; that such supposed defect was discovered by the president of the plaintiff when taking the note and mortgage from Shaw, and before taking the subsequent mortgages from Leland, upon the same property; but that the fact of such supposed defect was not communicated to Williams by any holder of these papers. It is only in view of the invalidity of this first mortgage that any injury to Williams could arise from those other mortgages. By the statute in force when the Leland mortgage was made, no seal was necessary. (Section 1, "Act Concerning Conveyances," approved January 12, 1875.) In effect, this statute was the same, as to the seal, as section 2920 of the Revised Statutes. Hence the mortgage was not invalid on that account, and it did in fact have precedence of the other two mortgages. This part of the answer was then immaterial to the issue, and was properly stricken out.

But the plaintiff was the holder of the note, and of a valid mortgage on real property to secure the same; yet instead of bringing an action to foreclose the mortgage, and for any balance that might remain after applying the proceeds of sale upon the sum due on the note, as he might have done, he filed his complaint against both of the defendants on the note alone, but had summoned only the surety on the note, and proceeded for a money judgment against him alone. This he had no right to do, not only because it was his duty to exhaust the securities of the principal debtor in his hands, placed there specially as a prior security, to protect the defendant, but also because the statute denies another action, by any party, for the foreclosure of the mortgage.

Section 4520 of the Revised Statutes of Idaho provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the

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amount due to the plaintiff; . . . and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt," etc.

There are no other provisions in that chapter affecting this case. As we have seen, the mortgage was valid, and it is not pretended that the security is valueless. The appellant claims that, upon a note so secured, an action ignoring the mortgage cannot be sustained; and cites *Bartlett v. Cottle*, 63 Cal. 366. In that case the court holds "that, in such case as the one at bar, an action cannot be maintained on the note alone, unless the security is valueless." In that case also the value of the security appears to have been in issue, and it was not shown to be without value. This was decided under section 726 of the California Code of Civil Procedure, which substantially corresponds with the Idaho statute above quoted. *Vandewater v. McRae*, 27 Cal. 596, was an action by the holder of a note, secured by a mortgage on real estate, against indorsers of the note. Commenting upon the statute in question, the court in that case say: "The words [in the statute] 'secured by mortgage' are descriptive of the right or personal liability contemplated by the section, and any personal liability not so secured is manifestly without its purview. . . . A mortgage which, by its terms, is made applicable to the promise of the maker only, can in no just sense be regarded as collateral either to the personal liability or to the 'right' of which the contract of indorsement is the source." The judgment in that case, for the reason that the defendants' contract was not that of makers of the note so secured, but was that of indorsers only, and so was not secured, was against the indorsers. But the doctrine of *Bartlett v. Cottle*, *supra*, is fully recognized.

There can be no question in the case at bar, that the mortgage was given to secure the note, for the safety of the appellant. So, in *Ould v. Stoddard*, 54 Cal. 613, it was held that where a mortgagee had prosecuted an action in Ohio to final judgment, upon a note secured by a mortgage on lands in California, he could not maintain, in the latter state, an action for foreclosure, for the reason that under this statute there can

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be but one action for the recovery of any debt secured by mortgage. But the respondent's counsel contends that as the note was several as well as joint, under section 4106 of the Statutes, the plaintiff, at his option, might sue either or both of the defendants; and if he chose to sue only the surety on the note, as he was not the maker of the mortgage, foreclosure of the mortgage, in that suit, was impossible; also that it is optional with the plaintiff to abandon the mortgage security altogether; and cites *Ladd v. Ruggles*, 23 Cal. 233. On that question, if there be any doubt about it, we do not decide. But this joint and several note was the debt secured by this mortgage; and a judgment against either, upon the note, equally precluded a judgment of foreclosure of the mortgage, and in effect canceled it. Subrogation of the defendant, to the rights of the plaintiff in said mortgage, even had it been made, as there was a mere pretense of doing (but which was not done), would be of no use or value to him. He could no more foreclose it than could the plaintiff. The plaintiff had no right, by prosecuting this action, thus to deprive the defendant of the benefit of his original stipulation, for security to be given for the note, for his own protection, on his becoming a co-maker of it. He had a right to plead this statute, and the several decisions of the court on that question, and the judgment rendered, were each and all erroneous. There are other points of error assigned, but, from the conclusions reached in the foregoing, they need not be considered.

The judgment in the court below, and the order overruling motion for a new trial, must be reversed. Judgment reversed, and new trial ordered. All concur.

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Argument for Appellants.

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(February 28, 1890.)

## BURKE ET AL. v. McDONALD ET AL.

[33 Pac. 49.]

**MINING CLAIM—ADVERSE CLAIM.**—It is not required in locating a mining claim that well-defined walls shall be developed or paying ore found within them, but something must be found in place, as rock, clay or earth so colored, stained, changed or decomposed by the mineral elements as to mark and distinguish it from the inclosing country, and experienced miners easily recognize it. Where the boundary of a claim is made excessive in size, with fraudulent intent, it is void, or if so large as to preclude innocent error, fraud will be presumed; if the markings are so indistinct that they cannot be easily traced, it will be good ground for filing an adverse claim.

**PRACTICE—CITIZENSHIP.**—It is a necessary allegation in a complaint of adverse claim to allege such claim has been filed in the land office, but it does not necessarily follow that it must be proven if not denied, but citizenship must be alleged, proven and found even if it is not denied.

**SUBMISSION OF SPECIAL ISSUES TO JURY.**—Section 4397 of the Revised Statutes leaves it optional with the jury in certain designated cases to find a general or special verdict. Where the issues are numerous, and their nature such as likely to confuse a jury, the court should insist on a special verdict, and should formulate issues into separate, distinct propositions, in logical, concise questions, and if it is not done the appellate court is warranted in holding it cause for reversal.

## APPEAL from District Court, Shoshone County.

William H. Clagett, F. Ganahl and Albert Hagan, for Appellants.

In law the center line is assumed to be the line of the lode, and the discovery lode is the controlling fact in the making of a valid location. This center line cannot be afterward changed so as to affect rights subsequently acquired. (*Idaho Rev. Stats.*, sec. 3100; *Patterson v. Hitchcock*, 3 Colo. 533; *Wolfley v. Labanon Co.*, 4 Colo. 116; *Eureka etc. Min. Co. v. Richmond Min. Co.*, 4 Saw. 323-324, Fed. Cas. No. 4548.) It is for the sole purpose of protecting subsequent locators that the legal claim of not to exceed fifteen hundred by six hundred feet is re-

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Argument for Appellants.

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quired to be so marked upon the ground that its boundaries can be readily traced. (*White v. Lee*, 78 Cal. 596, 12 Am. St. Rep. 115, 21 Pac. 363.) It is only valuable mineral deposits that are declared to be "open to exploration and purchase, and the lands in which they are found to occupation purchase." Where the contention is over a lode claim, the discovery of a vein or lode must be clearly shown to support a valid location. (U. S. Rev. Stats., sec. 2320; *Terrible Min. Co. v. Argentine Min. Co.*, 5 McCrary, 639, 89 Fed. 583; *Belk v. Meagher*, 104 U. S. 279; *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Gleeson v. Martin White Co.*, 13 Nev. 457; *Johnson v. Lowsly*, 13 Wall. 90; *Lansdale v. Daniels*, 100 U. S. 115, 116, 117.) A vein or lode is a continuous bed of mineralized rock within any other well-defined boundaries on the earth's surface and under it, and clearly separating it from the neighboring rock. (*Eureka Min. Co. v. Richmond Min. Co.*, 4 Saw. 308-313, Fed. Cas. No. 4548.) And this bed of mineralized rock must be within defined boundaries within the general mass of the mountain. (*Stevens v. Williams*, 1 McCrary, 487, Fed. Cas. No. 13,413, et seq.; *Iron Silver Min. Co. v. Cheeseman*, 2 McCrary, 194, 8 Fed. 297.) The right to locate and the right to purchase a mining claim is an entirety, and cannot be divided, and if the plaintiffs have not shown the discovery of a vein beyond a dispute, they have neither a valid location nor right to purchase the area in conflict of the United States. (*Tibbits v. Ah Tong*, 4 Mont. 537 et seq., 2 Pac. 759; *Noyes v. Black*, 4 Mont. 534, 2 Pac. 769.) The court erred in refusing to submit special issues to the jury and refusing to allow them to find a special verdict thereon. The court seemed to treat this proceeding as an action of ejectment solely, and assigned as his reasons for refusing the issues requested to be specially found, that it would tend to confuse the jury and that a general verdict would be sufficient. (*Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906; *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625; *Rosenthal v. Ives*, ante, p. 265, 12 Pac. 904.) Location notice under law of 1872 and law of Idaho territory. (*Drummond v. Long*, 9 Colo. 538, 13 Pac. 543; *Quimby v. Boyd*, 8 Colo. 206, 6 Pac. 462; *Gilpin Min. Co.*



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*v. Drake*, 8 Colo. 590, 9 Pac. 787; *North Noonday v. Orient*, 1 Fed. 522; *Jupiter Min. Co. v. Bodie Min. Co.*, 11 Fed. 610-666.)

Woods & Heyburn, for Respondents.

Where controverted questions of facts are submitted to a jury, an appellate court will not attempt to set aside the conclusion arrived at by the jury in the absence of fraud or corrupt practices. (*McKeever v. Market St. R. R. Co.*, 59 Cal. 300; *Wilson v. S. P. R. R. Co.*, 8 Pac. C. L. J. 936; *Graves v. Moore*, 58 Cal. 435; *Bensley v. Whipple*, 57 Cal. 268; *School District v. Heath*, 56 Cal. 478; *Glenn v. Arnold*, 56 Cal. 632; *Myers v. Spooner*, 55 Cal. 257; *Nathan v. Doane*, 55 Cal. 349; *Fitz v. Bynum*, 55 Cal. 461, 462; and about a hundred cases cited under section 288 of Hayne on New Trial and Appeal, p. 857.) What constitutes permanent monuments or natural objects is one purely for the jury. (*O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *Russell v. Chumasero*, 4 Mont. 317, 1 Pac. 713; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 385; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *North Noonday Co. v. The Orient*, 9 Morr. Min. Rep. 541; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.)

BEATTY, C. J.—The appellants, as claimants of the Lackawanna lode mining claim, situated in Yreka mining district, Shoshone county, Idaho, filed in the local land office their application for patent therefor, to which the respondents, as claimants of the Mammoth claim, within the times required by law, filed in said land office their adverse claims, and commenced this action in the district court, in said county. Upon the trial of the cause before a jury, a general verdict was found in respondents' favor, upon which a judgment being rendered, the appellants moved for a new trial, and, from the order of the court overruling such motion, they have appealed to this court. Whatever the value of the property in controversy may be, the cause, having been so ably and fully presented by eminent counsel, merits careful consideration. This has been given it, so far as the brief time between its submission and the necessarily early adjournment of the court permits. Our attention has been directed to numerous propositions involving ques-

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tions of both law and fact, of not all of which will we attempt a consideration. Appellants earnestly urge that no vein was discovered in the Mammoth prior to its location or that of the Lackawanna. The difficulty is not so much ignorance of the law's demand, or of what constitutes a vein under it, as its willful violation. The practice of posting notices upon any ground within which the existence of a ledge may be imagined has become so common that the emphatic requirement of the law, that a ledge discovery must initiate the location of a claim, is nearly forgotten. The courts will insist upon and enforce this most important provision of the law wherever opportunity offers. It must be remembered that every seam or crevice in the rock, even though filled with clay, earth or rock, does not constitute a vein, nor every ridge of stained rocks, its cropping. Nor, on the contrary, is it required that well-defined walls shall be developed, or paying ore found within them. But something must be found in place, as rock, clay or earth, so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the inclosing country. While the contents of ore-bearing veins widely differ, there is that indescribable peculiarity in the "ledge matter," the matrix of all ledges, by which the experienced miner easily recognizes his ledge when discovered. The evidence in this case does not clearly show such discovery of a vein in the Mammoth as the law requires.

It is also claimed by appellants that if the locators of the Mammoth did post their notice on September 17, 1885, as claimed, they, before marking its boundaries, left it, to prospect for and locate other claims, and before their return, the Lackawanna was located on the following day, and, as an evidence of the irregularity of their locations, I refer to the fact that in four days, commencing on September 16th, Smith, Catline and Flaherty located fifteen claims. The law does, in its liberality, allow the prospector, after the discovery of his vein, a reasonable time in which to develop its course, and then mark accordingly the boundaries of his claim; but it does not permit him, after having posted his notice, to leave his claim incomplete, and, going in quest of other claims, post his notice here and there over the country, to the exclusion of other prospectors, and at his

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leisure prospect and mark out his claims. While no hardships or unusual exertion is required of him, good faith and reasonable diligence are. So long as he exercises the latter, the courts will shield him, but not in the commission of any fraud upon the law. If in this case the evidence clearly showed as true what appellants claim, this court would place its seal of condemnation upon the Mammoth location. But these questions above referred to, with that concerning the performance of the annual assessment work on said claim, were submitted, under the instructions of the court, to a jury, composed in part, at least, of miners, and, in view of the conflicting testimony on these questions this court would not be justified in disturbing their conclusion.

Were the boundaries of the Mammoth so large as to render the location void? Easterly of the discovery point it was marked about one hundred and fifty feet longer than the calls of the notice, and was considerably wider than allowed by law, while the westerly one thousand feet was marked substantially correct in size. Strict accuracy in the marking of claims cannot be expected or required. The character of the ground over which the locator must make his measurements must be considered; if even, with unobstructed view, greater accuracy would be required than when the surface is broken, and covered with timber. If a claim is made excessive in size with fraudulent intent, it is void. If made so large that it cannot be deemed the result of innocent error, fraud will be presumed, or if from any cause it be made so large and with such indistinct markings that its boundaries cannot be readily traced, and subsequent locators, after reasonable diligence, cannot find the same, it would be void, as against another location made in good faith. Just what excess will be tolerated, or what will vitiate, cannot be defined, but must depend somewhat upon the circumstances of each case. In Montana, it has been held a claim located one thousand seven hundred and sixty-three feet long is void, and the tendency there is toward strict accuracy of boundary; while in other courts it has been held that in the absence of fraud the claim will be held void only as to the excess. (*Stemwinder Case*, ante, p. 456, 21 Pac. 1040; *Mining Co. v. Rose*, 114 U. S. 579, 5 Sup. Ct. Rep. 1055; *Jupiter Min. Co. v. Bodie Consolidated Min. Co.*, 11

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Fed. 675.) In this case it appears the ground is such that accuracy in measurement could not be expected; also that the Lackawanna was discovered and located mostly on the westerly end of the Mammoth, where the latter was correctly marked. It cannot be presumed, from all the circumstances of the case, the Lackawanna locators were misled by these markings, and the conclusion of the trial court is sustained.

The respondents having alleged in their complaint the filing by them in the land office of their adverse claim, appellants insist such filing must be proven, though not denied by them, and rely upon *Rosenthal v. Ives*, ante, p. 265, 12 Pac. 904, decided in this court, and *Mattingly v. Lewisohn*, 8 Mont. 259, 19 Pac. 310. The latter holds it a necessary allegation, but does not say it must be proven when not denied. In the former, this court held citizenship must be alleged, proven, and found, even though not denied. But why did it so hold? The reason is evident. Citizenship is an absolute qualification to the holding of mineral land. The government grants its lands only to its citizens. Before it will issue its patent to anyone, it must know positively that he is a citizen; hence the necessity of showing by the judgment of the court the citizenship of the applicant. Whether the plaintiff files or proves the filing of his adverse claim in the land office is a matter of no interest or consequence to the government. That is simply a question of practice which it provides for the protection of the interests of the adverse parties and which they may waive, if they desire. The appellants, not denying the allegation, waived their right of its proof by respondents, and the latter are clearly justified by section 4217 of our statute in not tendering testimony thereon.

We will consider together the alleged error of the court in not submitting special issues to the jury, and the informality of their verdict, which is as follows: "We, the jury in above-entitled cause, find the title to the right of possession of the area in conflict described in the complaint to be in favor of the plaintiffs"; upon which a judgment was rendered to the effect that plaintiffs were entitled to the possession of the ground in controversy as against the defendants. It must be observed this verdict simply finds the plaintiffs are entitled to the right of possession; it does not show they have such right by reason of a com-

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pliance with the absolute requirements of the law, or that they have it as against the government, or any but the defendants. It amounts to a declaration that, as between the parties to the action, the plaintiff showed the better right, and should prevail, which in *Golden Fleece etc. Min. Co. v. Cable Con. etc. Min. Co.*, 12 Nev. 320, was held the rule; but whether or not such was the law then, it has not been since the congressional act of March 3, 1881, providing that, if "title to the ground in controversy shall not be established by either party, the jury shall so find." Since this act it has become necessary that the decision, whether by court or jury, must show, not only that the successful party is entitled to the possession as against his opponent, but also as against all others, including the government, and by a compliance with all the laws applicable. The government is interested in knowing, before issuing its patent to a party, that he is a citizen; that he has discovered a vein; that he has performed the \$500 development work; that he has complied with the law. It is provided that upon the judgment in these adverse claim cases being certified to the general land office, together with the proper certificates of such claim, a patent shall issue to the successful party. If, therefore, a judgment is sufficient which shows only, as in this case, the title to be in the successful party as against his opponent, it might frequently happen that a patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of Congress. In the following cases judgments were reversed because of the insufficiency of the verdicts, some of which were more specific than the one under consideration: *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 660; *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625; *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1020. And *Rosenthal v. Ives*, ante, p. 265, 12 Pac. 904, was reversed because the judge who tried the cause failed to find the successful party was a citizen. This was not because that was a material issue under our practice, but that it was necessary to show his compliance with the laws. All these authorities are sustained by *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. Rep. 1110, and we must hold the verdict in this case informal and cause for reversal. Our statute, by section 4397, after designating the class of cases in which it is optional with the

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jury to find a general or special verdict, further provides that "the court may direct the jury to find a special verdict in writing, upon all or any of the issues." In cases where the number and nature of the issues are such as likely to confuse the jury, the court can greatly aid it by formulating such issues into separate, distinct propositions, and thus have them submitted in logical, concise questions, instead of in one confused mass. Through a general verdict, a jury is more likely to jump to a conclusion or yield to its impulse or sympathy, than when special issues are submitted, to which the facts can be directly applied. Certainly the court must submit only those material, and only in such number and form as will aid, and not bewilder, the jury. Is this a matter left entirely to the discretion of the court? It might be so held if the statute were designed alone for the convenience of the court, but it is not. On the contrary, its object is to aid the jury to the proper conclusions, and to promote justice in the administration of the law. It is a discretion that must be soundly exercised by the court, and subject to review as any other discretionary power when not properly exercised. The complicated nature of the issues in this case is such as to render it one in which special issues should be submitted, if ever necessary in any case, and the court's error in refusing the request of appellants in this matter is also cause for reversal. The appellants also asked the court to have the jury view the premises, as permitted by our statute. There are many features of this case which mark it as one in which this request should have been granted, but whether the action of the court is cause for reversal, it is unnecessary to determine. It follows from the foregoing that the judgment and order appealed from must be reversed, and the cause remanded for a new trial; and it is so ordered.

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Points decided.

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(February 28, 1890.)

HAVIRD v. COUNTY COMMISSIONERS OF BOISE  
COUNTY.

[24 Pac. 542.]

**MANDAMUS—IRREGULARITY OF RECORD—RES ADJUDICATA—FRAUD—  
ACT UNCONSTITUTIONAL—FEES—SALARY—OFFICER DE FACTO—  
OFFICER DE JURE.**

**MANDAMUS—IRREGULARITY OF RECORD.**—At the January term, 1889, in a suit between the parties interested in this proceeding, the court rendered a decision that the act under which the case was tried was unconstitutional and void, and reversed the court below, afterward amending the record and dismissing the action. The next day two of the justices ordered the record amended by restoring the word "reversed" for "dismissed" (the latter amendment alleged to have been made out of term time); *remittitur* was sent to court below as cause being reversed by court. Held, that the *remittitur* should have been to dismiss the case, and not being so, Havird had no speedy and adequate remedy at law, and *mandamus* was the proper proceeding.

**RES ADJUDICATA—FRAUD.**—In answer to Havird's application for a writ of mandate, the intervener, Gorman, avers the action is still pending in the district court, and this court is without authority to issue the writ. Held, that the greater portion of the declarations in the answer are *res adjudicata*, and will not be considered by the court. Held, further, that a judicial record cannot be contradicted by parol evidence, although it is elementary that no instrument, record or document is valid or can exist in the face of fraud, corruption or dishonesty, but in this proceeding the applicant is not in a position to assail the record.

**FEES—SALARY—DE FACTO OFFICER—DE JURE OFFICER.**—But for the fact that the statute (Rev. Stats., sec. 380) preserves the salary for the *de jure* officer, and forbids the issuance of a warrant pending the suit, the *de facto* officer would be entitled to both the salary and fees of the office, and if declared to belong to another, would be required to pay the same to the one found entitled, but even then the *de facto* officer would be entitled to his necessary expenses incurred in earning the fees and emoluments received.

Huston & Gray, for C. C. Havird.

George Ainslie, for John Gorman.

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H. W. Dunton, for Boise County.

No briefs filed.

SWEET, J.—Cary C. Havird was a candidate for sheriff at the regular election in Boise county held in November, 1886. He was declared elected to said office by the canvassing board of said county, and in due time received a certificate accordingly. Within the time prescribed by law, John Gorman, the opposing candidate for sheriff at said election, commenced a proceeding under an act of the territorial legislative assembly approved January 30, 1885, in which he contested the right and title of said Havird to said office. The cause was heard by the district judge in and for said county, as by said act provided, and a judgment was rendered in favor of the applicant herein. John Gorman, the intervener in this action, moved for a new trial, which motion was by said judge overruled; and from the order overruling said motion said Gorman appealed to the supreme court of the territory. The cause came on for hearing before said court at its January, 1889, term, and on the eleventh day of March, 1889, the opinion of the court was rendered by Mr. Justice Berry; the court, by said opinion, declaring the act under which the trial before the judge in said Boise county was held to be unconstitutional and void, and by reason thereof caused to be entered in the records of this court an order reversing the judgment rendered by the judge of said district. On the eighteenth day of the same month the judgment of the court as rendered on the eleventh was amended on motion of counsel for the respondent, and, by this amended judgment, it was ordered that the action be dismissed; the substance of said order being that the word "dismissed" was substituted for the word "reversed." On the following day an entry appears in the record setting forth that Chief Justice Weir and Justice Logan, two of the members of said court, having reconsidered the action of the court as entered of March 18th, ordered that the motion to amend the original entry of March 11th be denied, and that the word "reversed" should stand as the judgment of the court in place of the word "dismissed."



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The matter comes up at this time on an application by Cary C. Havird for a writ of mandate commanding the county commissioners of said Boise county to order the issuing of warrants, payable to the order of said Havird, as compensation for services rendered as aforesaid, in the form of salary, and for fees and expenses allowed by law. The commissioners answer the order to show cause by stating that the title to the office is involved in an action now pending in the district court in and for that county, and that, under section 380 of the statute, the said board is prohibited from ordering any warrants drawn in payment of salary during the pendency of an action over the title of the office. John Gorman, the intervener avers that the action is still pending in the court below, and that, while such action is pending, he is an interested party, and invokes section 380 of the statute to show that this court is without authority to issue said writ. The allegations contained in the pleadings cover a much wider range of investigation. Indeed, under the complaint and answer, it might be possible to try the entire case, as it is averred on the one hand that one party was elected, and, on the other hand, the election of the first party is denied, and the election of the second party averred. A greater portion of these declarations *pro* and *con* are *res adjudicata*, and will not be considered by this court. The only question here presented is the *status* of the case after the decision rendered by the supreme court at its last session.

What purports to be the record of the court, particularly the entry of March 19, 1889, is not regular upon its face, and in terms states that the action therein taken is the result of a conclusion reached by two of the members of the court; but it is not declared to be the action of the court by the court, and, from its very appearance, would perhaps suggest that any person interested would be justified in seeking to investigate its character. The intervener, as well as the board of county commissioners, in answering plaintiff's application in the matter now at bar, rely upon the entry made on March 19th, and upon the *remittitur* sent down by the clerk of this court to the court below, as justifying the position taken by them, which is that the action over the title to said office is still pend-

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ing in said Boise county. Unquestionably the *remittitur* so states. It is before us; and, although the entry of March 19th does not declare that the conclusion therein mentioned was reached by the court, the *remittitur* was to the effect that such was the order, not of two of the justices, but of the court. Counsel for plaintiff offer to show that the entry of March 19th is not a record of this court. They contend that that entry was made out of term time, after the court had adjourned, upon the order, not of the court, but of two of its individual members. If this statement were true, it would not only not be a record, but it would be a false entry in a record, and must result in very serious consequences to those who made it.

The plaintiff introduced those entries in the record appearing as of March 11th and March 18th, and there rested. When the intervener and defendant offer to introduce the entry of March 19th, plaintiff objects, and offers to prove by parol evidence the irregularities above set forth. Defendant and intervener contend that the record of the court is conclusive, and that it cannot be assailed, and numerous authorities are cited in support of the proposition. On general principles, this court will not question the doctrine. It is a fact, however, that no instrument is sacred if in any manner tainted with fraud. A judicial record cannot be assailed, but this is a different proposition from denying the existence or validity of a record. In other words, the record, once established, is unassailable, and, as the honest record of the court, is absolutely unquestionable. In *Lowry v. McMillan*, 8 Pa. St. 157, 49 Am. Dec. 503, the court uses this language: "A record is entitled to great sanctity in the law, but then it must be an honest record. It is in vain to talk of the danger of altering or explaining a record by parol. Everything imbued with fraud must give way before credible sworn testimony." Note 5, page 170, of Bigelow on Fraud, reiterates this doctrine, and there distinctly states that the question of fraud may be raised so long as it was not a question involved in the trial of the cause; in other words, if it in any manner tampered with the rights of the parties, the jurisdiction of the court, or the correctness of the proceeding, at such time or in such manner as that the interested party was not able to be heard to pro-

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tect himself. The general principle, therefore, is that a judicial record cannot be contradicted by parol evidence. It is an equally well-known, indeed an elementary, principle, that no instrument, no record, no document, is valid, or can exist, in the face of fraud, corruption or dishonesty. But, in the matter at bar, is the applicant in position to assail the record? We think not. Without attempting to specify how such a record may be assailed, and in what form the allegations should be made to admit of the introduction of parol evidence to contradict the record, it is sufficient to say that to entitle the plaintiff to offer parol evidence in proof of so serious a charge, and of a fraud so serious in its character, and so far-reaching in its effect, the allegation must be fully and fairly made, and the issue clearly and positively tendered. In this case, and under the allegations of the complaint, the entry of the 19th of March cannot be assailed.

This court is called upon, then, to settle the *status* of this case upon all of its records here, the effect of the action of this court a year ago, and the rights of the parties under it. The opinion of the court as rendered last March, duly filed on the 11th of said month, and these various entries, will be used to guide us in reaching a conclusion in the matter at bar.

The opinion declares that the act of the legislature under which the contested election case was tried was unconstitutional and void. To say that the act is unconstitutional and void, and that the proceedings under it may be valid, is an absurdity too patent to be discussed. This court reversed the court below. Reversed what? Reversed its decision? No. It simply declared that there was nothing to decide; that the act under which they were proceeding was in itself void, and, as a matter of course, the proceedings themselves could not possess more validity than the act under which they proceeded. Then, why should it be sent back? Sent back for another trial under an unconstitutional act? But this discussion may be ended by declaring that when the supreme court held the act of January 30, 1885, to be null and void, the case of *Gorman v. Havird* no longer existed, and as a legal entity, so far as its having any

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possible effect upon either of the parties to the suit is concerned, never had existed.

We now pass to the record. We find an entry on the 11th of March declaring that the judgment of the lower court is reversed; another, on the 18th, to the effect that it should be dismissed; and on the 19th two of the judges, personally, have reconsidered what the court did on the 18th, and restored the action of the 11th, or at least attempted so to do. Perhaps it is as well to pass this record with this statement; for, whether it be a true record or not, it is entitled to but little consideration, and the more it is studied the more doubt it creates as to how the opinions of the court were decided, and how that particular decision was announced. It amounts to but a quibble, at best. The one entry declares that the court below shall proceed as it may deem best; and the other, that the action shall be dismissed. The opinion of this court was certified down to the court below; and no matter what the court below may have thought, there was but one thing for it to do, and that was to dismiss the action. And this brings us down to the next point in the matter, or to the next quibble presented—namely, whether this court should send the case back to be dismissed by the judge of the district, or whether this court should order it dismissed. It is a distinction without a difference. When the supreme court thus clearly indicated the invalidity of the law, and the inevitable *status* of the case under it, the applicant should have had his money, and the expense of this litigation ended. The case having been returned, however, we find that it has been continued from time to time; and the plaintiff is still carrying on the expense of conducting the executive business of the county without pay, and, judging of the future by the past, without prospect of ever having any, or without any probability of ever reaching a settlement of the legal questions involved.

Let there be no misunderstanding about the conclusion reached this time. The case ought to have been dismissed. It was the intention of the supreme court a year ago that it should be dismissed; and the retention of the case in court, and its continuance, did not, and does not, afford the plaintiff not only a speedy and adequate remedy at law, but affords him no rem-

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edy at all. Under such a condition of affairs, he was authorized to appear before this court, and declare that he had no speedy and adequate remedy at law, and invoke the extraordinary powers given this court to secure to him the rights and privileges guaranteed him by law. Let it not be understood that the intervener or the commissioners are in any manner at fault. They were bound by the *remittitur* sent down to them; and, unless the judge saw fit to act in accordance with the implied order of the court, these parties had no alternative but to await the remedy or the relief that time would bring. The intervener, Gorman, is but exercising the right of a citizen in contesting this election; and, until the act under which he was proceeding was declared unconstitutional and void, he was pursuing methods prescribed by law. It is no wonder that, under the conflicting entries in the records of this court, and the *remittitur* sent down, both counsel and client were at a loss to know what steps to take, or in what manner to proceed.

We now pass to the question of fees and salary claimed by plaintiff, and the distinction, if any there be, as to the amount due on account of salary, and the amount due by law, and allowed by the board, for expenses and fees. In the absence of a statute on the subject, plaintiff would be entitled to receive both the salary and the fees pertaining to the office of sheriff, for the reason that, being in possession of the certificate declaring him duly elected, and having qualified as provided by law, he would be presumed to be entitled to all of the fees and emoluments of the office; and, if the title to the fees were subsequently declared to belong to another, the person subsequently declared elected would be entitled to sue the *de facto* officer for all fees and emoluments received by him during the time he was in office. Even then, however, the *de facto* officer would be entitled to receive the necessary expenses incurred by him in earning the fees and emoluments received. These principles are laid down in the case of *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52, and *Auditor v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382. Our statute, by section 380 of the code, preserves the salary to which the *de jure* officer is entitled by forbidding the issuance of the warrant during the pendency of the suit. As before stated, were it not for this decision, plaintiff would be

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entitled to receive the salary attached to the office of sheriff of his county by virtue of his *prima facie* right to exercise the duties of the office, and, naturally, to receive the compensation therefor. But we do not think that this section applies to that portion of the sheriff's bill or bills which have been allowed by the board on account of his expenses. For instance, plaintiff was allowed by the board of commissioners, for boarding prisoners, \$692.25; for jailer's fees, \$1,302; for transportation of prisoners, \$156.15; and other items of like character. He is entitled to this money even if the intervener were finally to recover the title of the office. It is due for money expended; and Mr. Gorman, never having expended the money, would not be entitled to it, either from the county or from plaintiff. In other words, the plaintiff, in possession of his certificate of election, and all other *indicia* of office, made necessary expenditures out of his own pocket on behalf of the county. There can be no question of his right to receive that money, and it should have been paid to him long ago. It was proper enough to withhold the \$2,978 on account of salary during the pendency of the action inaugurated to test the title of the office; but, when that action was disposed of by the highest court in the territory, there was no longer any reason for withholding the payment of the salary. It is true that, under the *remittitur* sent down from this court, this action may seem like a hardship against Gorman. It is, unquestionably, an unfortunate condition of affairs for both; for, as will be seen by glancing at the history of this case, not only has the plaintiff been denied a speedy and adequate remedy, but the intervener seems to be without remedy at all. The condition of the record, the continuance of the case, and the numerous awkward circumstances with which the entire transaction is surrounded, seem to have been reached without the co-operation, or even knowledge, of the intervener or his counsel, while it is perfectly plain that the county commissioners would not know what to do, and could be safe only in doing nothing.

In accordance with the decision heretofore rendered, the judgment of the court is that the action which by the *remittitur* before us appears to be now pending in the lower court should be dismissed, and that a writ of mandate forthwith issue, under

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Opinion of the Court—Sweet, J.

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the seal of the clerk of this court, directing the defendants, the county commissioners of said Boise county, to order the issuing of a warrant or warrants, in the name of plaintiff herein, for the amounts heretofore allowed by said board during the time specified on account of fees and expenses, and that, immediately upon the dismissal of said action by said district court, a writ of mandate shall issue, under the seal of the clerk of this court, commanding said commissioners to order the issuing of a warrant or warrants, in the name of plaintiff herein, for the amount due him as salary for the time specified, and that a copy hereof be certified to said district court.

Beatty, C. J., and Berry, J., concurring.

ON APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES.

A writ of mandate is given or withheld in the sound discretion of the court, but the exercise of this discretion is subject to review. In the matter of *Havird v. County Commissioners* (Gorman, intervener), the court ordered the issuing of the writ. The intervener has applied for permission to appeal to the supreme court of the United States. The appeal is not so much desired on the ground of questioning the exercise of discretion by this court as for the purpose of reviewing the decision rendered by the court a year ago upon the constitutionality of the act under which the case was tried. The writ was granted in the matter at bar by virtue of the decision rendered a year ago, and the intervener declares that that decision was wrong, and expects the supreme court of the United States to so hold. We are of the opinion that when this matter is presented to the supreme court of the United States, it will simply inquire as to whether this court abused its discretion in ordering the writ, but will refuse to review the decision of a year ago upon the constitutionality of the act, and that the appeal would, therefore, be dismissed. We are also of the opinion that, if the supreme court of the United States did review the decision of a year since, and reverse the judgment of the supreme court of this territory as to the constitutionality of the act, and by reason thereof a new trial was had, and Gorman should recover

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Points decided.

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the title to the office in question, still Havird would be entitled to his fees and expenses. As the *de facto* officer, and in possession of all the *indicia* of office, we do not entertain the slightest doubt as to Havird's rights in this matter, and that Gorman's action against Havird must be for the profits only. But the intervener contends that we are wrong, and asks that we grant him an appeal to the supreme court of the United States; and we are not disposed to deny it. If Havird were a mere usurper of the office, he would not then be entitled to receive anything. His right, however, to receive his expenses as a *de facto* officer shows clearly the line drawn between a mere usurper and a person in possession of a certificate duly certifying his election. We feel that, in granting this appeal, we are trespassing seriously upon the rights of Havird to receive forthwith the money which he has expended in the interests of the county, and which, in any event, he is entitled to recover. Perhaps the appeal ought not to be granted, under such circumstances. Still, we do not feel like refusing to any petitioner at the bar the privilege of being heard by the highest court in the land, if, by any construction of the statute, it may be held that he is entitled to the writ. It is ordered, therefore, that the appeal may be had.

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(March 1, 1890.)

GILPIN v. SIERRA NEVADA CONSOLIDATED MINING  
COMPANY.

[23 Pac. 547, 1014.]

**MINE OWNERS' RIGHTS—EQUITY—POWER OF COURT—INJUNCTION—NONJOINDER OF PARTIES.**—Nonjoinder of parties plaintiff is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury.

**WHEN PARTY ENTITLED TO INJUNCTION.**—Where a party makes a *prima facie* case that he is in possession of a claim, and his surface location shows a vein the apex of which is within the lines of the claim, and carries valuable ore, he is entitled to an injunction restraining other parties owning contiguous claims from extracting ore from a vein within his lines until the matter can be determined on its merits.



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Statement of Facts.

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**CLAIM OWNER'S RIGHTS—IRREPARABLE INJURY—WASTE.**—Where a party alleges that acts are being committed and threatened to be continued in violation of his rights, which will cause waste, great or irreparable injury, he is entitled to a writ restraining the commission of such acts, particularly where the subject matter of the litigation is a mine, and the act complained of is the removal of the ore therefrom, by underground workings, which would render the mine worthless.

**BOUNDARY LINES OF MINING CLAIM.**—Section 2322 of the Revised Statutes of the United States provides, among other things, that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lode or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

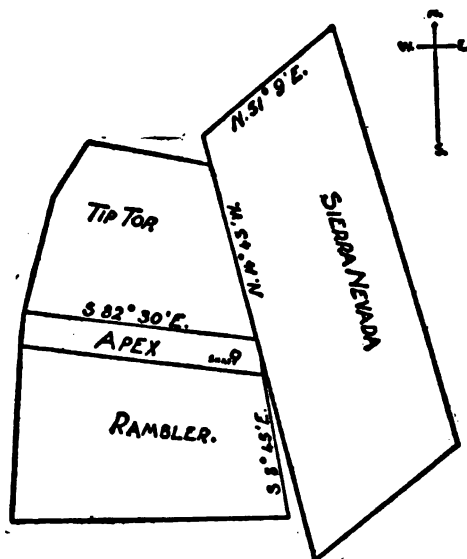
**APPEAL** from District Court, Shoshone County.

No briefs found on file.

The complaint shows the plaintiff to be the owner, and entitled to the possession, of one compact piece of mining lands in the Yreka mining district, Shoshone county, Idaho territory, embraced within the outer boundary lines of three contiguous mining claims, called the "Apex," the "Rambler," and the "Tip Top," all constituting the plaintiff's said mining grounds; that while the plaintiff was so in possession, on the 29th of October, 1888, the defendant, a corporation, entered upon such grounds of the plaintiff, and with force, etc., took possession, and unlawfully ejected the plaintiff, and still unlawfully withholds the same from the plaintiff, to his damage of \$100,000; that the plaintiff's said claim is upon a mineral zone or belt containing gold, silver, and other precious metals; that previous to such ouster the plaintiff had been working and mining the three locations named as above, as one mining claim, continuously since the third day of November, 1887; that the defendant owns a mining claim adjoining on the east of these several claims of the plaintiff, so constituting one claim, the defendant's claim, being called the "Sierra Nevada"; that the western side line of the Sierra Nevada is coincident with eastern end boundary line

## Statement of Facts.

of said Tip Top claim, and also with the eastern end line of the Apex claim, and nearly coincident with the eastern end line of the Rambler claim. The relation of the properties of the parties is shown by the following diagram:



The plaintiff further claims, in substance, that the plaintiff's middle claim, the Apex, is upon and along said mineral zone or belt; that the mineral-bearing rock in place is a part of such zone, and crops to the surface in and upon the Apex location, the true apex of the zone or belt being within the exterior boundaries of the Apex claim; also, that the zone or belt is of greater width than the Apex claim, and extends on either side of the Apex, and is covered by the Rambler and Tip Top locations. The plaintiff also claims, and the fact is admitted by the defendant both in its cross-complaint and in argument, that the defendant, prior to the commencement of this action, has been working the Sierra Nevada claim, and from the underground tunnels in the Sierra Nevada claim has extended its works and tunnels, beyond its western side line, into and upon the grounds claimed by the plaintiff, and maintains his possession thereof against the plaintiff, and has been and is extracting and carry-

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Statement of Facts.

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ing away ore therefrom, and is, as the plaintiff avers, preventing the plaintiff from working his mines within his own mining grounds; that such acts are waste, and irreparable damage to the plaintiff's property; to recover which property, with other purposes, this action is instituted; that the defendant is a foreign corporation, and insolvent; and prays that pending the litigation a temporary injunction be granted, etc. The allegations of the complaint are made positively, as of the plaintiff's own knowledge, and the same are verified in the same manner.

The answer is upon information and belief, and is so verified. It admits that the defendant is a foreign corporation. Except this admission, it denies every other material allegation of the complaint, and prays that the complaint be dismissed. The defendant also files his cross-bill, and prays affirmative relief; and for such purposes makes this plaintiff, Larry O'Neill, A. D. Bevin, David Le Ban, A. M. Baldwin, Edward Leonard, W. T. Malony, William Rogers, C. J. McMillen, B. F. Bates, and W. B. Heyburn, parties defendant, and avers: 1. The corporate character of the cross-complainant. 2. That on the 6th of April, 1886, the lands of the Sierra Nevada claim were public domain, and unoccupied mineral lands, and on that day were duly claimed, by parties named, as a mining claim, under that name; that said locators, with others who had become interested in the Sierra Nevada claim, on June 3, 1886, "having discovered the true strike and course of said vein," filed an amended location of said claim, as it now appears on the diagram heretofore given; that the cross-complainant became the owner of such amended location and claim on the 15th of November, 1886, and is still such owner, and in possession of the same, and has expended \$100,000 in improvements thereon, in tunnels run in and upon said vein, cross-cuts, shafts, etc., and is still in possession of all such tunnels, etc. 3. "That while said E. M. Gilpin claims to be the owner in his own right of said Apex mining claim, as a matter of fact, each and all of the parties hereto, to wit [the other defendants in this cross-complaint named] are the owners of undivided interests therein as tenants in common with the said E. M. Gilpin," and the claim of said Gilpin to be the sole owner is untrue; wherefore said parties are joined as defendants herein in order that "their claims, together with the

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Opinion of the Court—Berry, J.

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claim of the said E. M. Gilpin, may be fully and finally determined, adjudicated, and settled"; that said defendants "actually claim an interest unknown to the cross-complainant in and to the premises hereinbefore described, and in and to the vein thereon, which is the Sierra Nevada lode mining claim and vein"; and, that such claim may also be settled, it is necessary that all of said defendants be made parties. 4. That all of the defendants are insolvent, and are pretended owners of a mining claim described in the complaint of the plaintiff, Gilpin, as the Apex, Rambler, and Tip Top mining claims, and, as such alleged owners, have by their underground workings entered upon the Sierra Nevada claim, and by shafts, etc., have gone down and broken into the works of the cross-complainant, "made by its following its said vein, upon the dip thereof, into the ground," and threaten to take and hold possession, etc., of said workings so broken into, and are engaged in underground works with that intent. 5. That the locations of the Apex, Rambler, and Tip Top are in fact void and of no effect, because they were made, or attempted to be made, within the line of the Sierra Nevada, etc., and that, if the defendants be allowed to carry out their designs, the cross-complainant will sustain irreparable damages. 6. And prays that the defendants named, except said Gilpin, be brought in as defendants; that all such defendants be decreed to have no right to any of the ground in controversy; that pending this suit the defendants be enjoined from entering upon, etc., any of the grounds in dispute, and upon the determination of the action the injunction be made perpetual.

A large amount of evidence was taken upon the issues so made up, and upon the fifth day of February, 1890, his honor, Judge Sweet, by order, denied the injunction. From that order an appeal is taken by the plaintiff to this court.

W. B. Heyburn and W. W. Woods, for Appellant.

William H. Clagett and Albert Hagan, for Respondent.

BERRY, J. (After Stating the Facts).—There are three principal points in this case: 1. Is the plaintiff the owner of the mining grounds claimed by him, so as to be entitled to invoke the aid of this court to prevent the acts complained of? 2. Is

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Opinion of the Court—Berry, J.

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the injury alleged of such a character as to warrant the exercise of the equity power of the court? And 3. Is such injury, in fact, threatened or being done?

As to the question of nonjoinder of parties plaintiff, that is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury. A party may intervene to protect by injunction his own interests, as well as the interests of his cotenants. But, if this were otherwise, the deeds to plaintiff introduced in evidence on the hearing cover all the interests of each of those persons in each of the three claims alleged by the plaintiff to belong to him, except said W. B. Heyburn, who is not shown to have any interest in either of said claims; and from the evidence there appears to be no ground for such claim.

We may first inquire, then, as to whether the plaintiff has shown sufficient to give him a standing in court. This case seems to have been tried, in part at least, upon the theory and tacit understanding that *prima facie* proof of the plaintiff's title was all, on the question of location, that need be shown in such a case as this. After some evidence had been put in by the plaintiff tending to show the validity of his location of the Apex claim the court asked: "Are you gentlemen going into matters showing everything which goes to show a valid location? Plaintiff's Counsel: We do not want to. Defendant's Counsel: We do not either. Plaintiff's Counsel: We just propose to make a *prima facie* case"—and passed immediately from the subject of the Apex location (which to that point had been the subject of the evidence) to the location of the Rambler. This may not be considered as a stipulation releasing the plaintiff from the obligation to introduce further evidence on the location of the Apex, or that the evidence already in made a *prima facie* case of location; but it seems to express the mutual understanding between the court and the counsel on either side as to the theory and rule of law on which the case was to be heard and determined; and may well have had an effect in restricting the amount of evidence which either side might deem necessary after making a *prima facie* case. It is not to be presumed that the defendant, on a preliminary motion, and especially under such circumstances, would introduce all the evidence he would on the trial.

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Opinion of the Court—Berry, J.

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From a review of the plaintiff's evidence up to the close of the examination of John Gill this theory was evidently relied on; but afterward, however, the plaintiff returned to the subject of the location of the Apex, introduced Michael Gibbons, John M. Burke, W. Clayton Miller, J. M. Porter, C. D. Porter, and other witnesses as to the facts of locations, as to the character of the ledge claimed in the Apex, its outcrop within the Apex lines, the character of the material as to ore, its appearance or non-appearance in the shaft sunk from the surface of the Apex, the dip of the underground veins, and the relation of the ledge claimed for the Apex with the defendant's drifts beyond the west side line of the Sierra Nevada, and on other points. Much of this evidence was controverted by the witnesses of the defendant, and some of it was corroborated; but, on the whole, the weight of the testimony seems to be in favor of the validity of the plaintiff's locations. He certainly makes a strong *prima facie* case, covering his surface locations, and, of course, to the vein in the Apex, whatever it may be, and wherever it may run or dip. The defendant, in its brief, says: "The plaintiff should establish his title to the surface ground under which he claims, which, to say the least, is very doubtful upon the showing." This is the defendant's view after the evidence is all in. It must be noted that the plaintiff is in possession of his claim, and the presumption is that his possession is lawful, and the burden is on the defendant to repel such presumption, and also that one object of this action is to settle the question of that right. In the cross-bill the defendant demands that it shall be settled. The action of the judge, or of either of the judges, before whom this motion has been considered, did not affect, or tend to affect, that settlement. The judges had no authority to do that. The fact of the plaintiff's compliance with the law, or his noncompliance, is a question of fact only, to be determined on the trial of the case. If, then, after all this preliminary proof on both sides is in, the question is pronounced by the defendant as "doubtful upon the showing," the *status* of the plaintiff as a proper party to demand the preservation of the property he is contending for is practically conceded. But without such concession the law insures such right to the plaintiff.

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Opinion of the Court—Berry, J.

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We may then inquire as to the character of the injury alleged. By section 4288 of the Revised Statutes of Idaho, subdivisions 1-3, it is provided that an injunction may be granted "(1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually"; and "(2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff; (3) when it appears during litigation that the defendant is doing . . . some act, in violation of the plaintiff's rights, respecting the subject of the action, and [having a] tendency to render the judgment ineffectual." The statute seems to be framed to meet the case of such an injury as is here complained of. The subject matter of the litigation is a mine, which is valuable only for the mineral it contains. To remove that mineral is certainly waste, and waste is one ground for the issuance of this writ. It is also great injury; and that is another ground, whether it be reparable or not. Irreparable injury is still another ground, disjoined in the statute from the other grounds. To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a "tendency to render ineffectual" any judgment which the plaintiff might recover. Conceding the plaintiff's rights to his mining claim and to the ledge to be as stated in the complaint, it cannot be argued that continuing to remove the ore from the mine is not waste of the property, nor that such acts do not constitute great damage, nor that to do so does not tend to render a judgment in his favor ineffectual. The chief argument of the defendant is that the defendant is solvent, and abundantly able to pay any damage which may be found against it. But even on this point the case is against the defendant. The complaint states that the defendant is a foreign corporation. That is admitted. Also, positively, that it is insolvent. That is only denied on information and belief. There was no evidence given on the subject at the hearing. Hence, that allegation of a fact in the case, except for the purposes of pleading only, must be taken as unanswered.

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Opinion of the Court—Berry, J.

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On the whole, upon this point, it may well be questioned whether the plaintiff has not fully shown that the injury, if consummated, will be irreparable. But, whether it be fully shown or not, the other statutory grounds, as we have seen, are sufficient to authorize him to claim an injunction.

We may then turn to the main and last consideration in this case, and inquire whether the evidence taken shows that the injury complained of is in fact being done. We have before said that, *prima facie*, a miner is confined within the boundary lines of his claim. Section 2322 of the Revised Statutes of the United States, provides, among other things, that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The claim of the defendant is that the veins of ore on which the defendant admits it is working are veins, the top or apex of which lies inside of the side lines of the Sierra Nevada claim. On the other hand, the plaintiff avers that the apex of such veins is not within the side lines of the Sierra Nevada claim, and hence that the defendant has no right to follow it within the plaintiff's lines. His theory is that the true apex of the lode is in his Apex claim, and that its strike is nearly at right angles with the western side line of the Sierra Nevada claim, and that the dip of the vein matter is more to the south than is claimed by the defendant. But the plaintiff also urges that, wherever the apex of this vein may be, or if it have no apex at all, but is simply a blanket vein, if its apex be not between the defendant's side lines, the defendant has no right to follow it into the plaintiff's grounds, or within the boundaries of the claims of which the plaintiff is in possession. That is a proper construction of the law. The defendant's right to that ore, if he have such right, must be based solely upon the fact that the vein has its apex within its own side line. The difficulty in determining this matter is greatly increased by the



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Opinion of the Court—Berry, J.

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fact that no up-raises upon the vein are shown to have been made by the defendant to determine its apex, or to show its dip or trend. No shafts have been sunk on any of the ground in question, except it be the shaft in the Apex claim, which penetrated the workings of the defendant. Considerable evidence has been produced, mostly (unless we except the evidence of the Apex shaft, and diagrams and plats of defendant's workings) of a speculative character. There is in that evidence much conflict on material points. But, considering all of the witnesses of equal credibility, the circumstances under which their knowledge was obtained, and the probabilities of their correct understanding of the facts, throws light upon many of these apparent discrepancies; and the actual measurements and plats of skillful engineers show controlling facts, in view of which the oral evidence must be understood, and erroneous theories must be corrected. The courses of the surface lines of these several claims require careful attention. The fact that the Sierra Nevada claim has been relocated and swung around from its original location has little or no bearing upon what is here the main question. We are to consider the claim as it now is.

It is proved without a question that the plaintiff sunk a shaft from about midway between the side lines of the Apex claim, and near the eastern end line, in what is described as "ledge matter," consisting of quartzite, talc, and some ore, at a considerable deflection to the south from a vertical line, following the dip of this so-called "ledge matter" in its several variations, but always inclining to the south, a distance of about one hundred and fifty feet, and was led thereby upon and into the underground workings of the defendant; that such shaft, in its descent, when the defendant's work was struck, had passed beyond the side line of the Apex claim, a considerable distance into the Rambler grounds; that in the descent the plaintiff found some ore before reaching the defendant's works, and had put some in sacks before reaching the lagging over the defendant's tunnel. This so-called "ledge matter" is testified to as continuous. It is worthy of note that the ore which the defendant was tunneling and stoping out was, in character, carbonate and galena.

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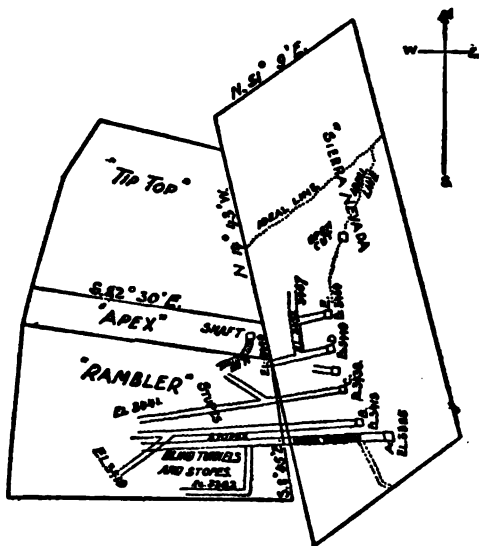
Opinion of the Court—Berry, J.

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“Witness Gibbons.—Q. State from your observation as to the quality of the ore. A. It was carbonate, I said.” This does not seem to be controverted, and the fact may bear upon the question of apex or dip; for it is a matter of common knowledge that carbonate ores are sometimes found in blanket veins without apices or dips. The extraordinary width of this mineral belt or zone—extending, as all concede, often to many hundreds of feet—is unusual, and hardly conceivable in a fissure vein; also its position, almost horizontal, at least in the claims in question. All, taken together, may raise strong doubts, in the absence of actual demonstration, of its being in its main breadth a fissure vein at all. If that were so, it would be an end to the controversy between the parties, and the injunction should, of course, issue. But the case is presented as concerning a fissure vein only, with the usual apices and dips; and so we must consider it, by the light given us by the evidence. In examining the maps and diagrams in the case, our attention is at once called to the fact, from the map of the defendant (exhibit “X”), that the mean dip of the vein in the grounds claimed by the plaintiff, corresponding, also, mainly to the evidence of the witness, is south, five degrees west. The north side line of the Apex claim runs south, eighty-two degrees, thirty minutes east. Hence, such dip is only two and one-half degrees east of a right angle with that side line of the Apex claim, or nearly at right angles with it. The lead of the vein as claimed by the defendant on that map seems by inspection to be about north, from five to ten degrees east; so that the average dip, as the defendant claims it, would deflect from the lead of the Sierra Nevada ledge something less than five degrees—possibly not at all. It was stated on the argument, and not controverted, and as we think the rule is, that the true average dip of a vein is always at right angles to the lead; and, if the veins so being worked by the defendant are really dips from the Sierra Nevada claim or lead, it is difficult to harmonize these principles and facts. But they do all harmonize with the claim and theory of the plaintiff. To comply with the defendant’s theory, the average true dip should be west, and perhaps some degrees north of west, or at least ninety degrees from what it is shown to be on the map, and also as stated by the witnesses.

**Opinion of the Court—Berry, J.**

The following diagram, drawn from the exhibits, mostly of the defendant, will tend still further to illustrate the facts in the case:



Tunnel A is a working tunnel, and some distance below the plane of the mineral and of the tunnels upon the ore. All the tunnels, B, C, D, E, are claimed by the defendant to enter on the outcrop of the ledge; but the elevations marked on exhibit "X" show that such outcrop is not an apex or crest of a vein dipping laterally from it, but that it is an outcrop on the mountain side of a mineral deposit, nearly horizontal in position, but rising slightly as it recedes into the hill, and at right angles with a line formed by the mouths of these tunnels. All these tunnels run on the footwall, or rather on the bedrock or floor of the ore deposits. Here there can be no dispute as to the respective elevations of the mineral at the points named. The elevation of the bottom of the mouth of tunnel B is three thousand four hundred and fifteen feet. At its face, in the Rambler claim, it is three thousand four hundred and nineteen feet—a rise of four feet. The elevation at the mouth of tunnel C, distant from B about one hundred and fifty feet, is three thousand four hundred and thirty-eight feet. At a point a little over

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Opinion of the Court—Berry, J.

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two hundred feet west, where the measurement was taken, its elevation is three thousand four hundred and forty-one feet—a rise of three feet. Tunnel D, at its mouth, is three thousand four hundred and forty-nine feet. At about one hundred and fifty feet west, its elevation is three thousand four hundred and fifty-four feet—a rise of five feet. At a point near the southeast corner of the Apex claim, it falls to three thousand four hundred and forty-eight feet—a depression of one foot below its mouth, about two hundred and fifty feet distant. The elevation of tunnel E at its mouth is three thousand four hundred and sixty-nine feet. In about one hundred feet it descends to three thousand four hundred and sixty-seven feet, and in about sixty feet further rises to three thousand four hundred and seventy-two feet, or to a plane three feet above its mouth. It is admitted on the argument that the water from these workings of the defendant flows out at the mouths of these tunnels. When we consider that these tunnels are practically almost parallel with each other, and running nearly west, it seems impossible to conclude that these deposits of ores in any way dip from anything yet shown in the Nevada claim. They all rise upward from the entire Sierra Nevada system, whatever its formation may be.

But, further considering the tunnel developments, there is not one of them that does not leave the line of the Sierra Nevada outcrop, practically, at right angles to it—each, as testified by the defendant's witnesses, upon a vein of mineral, and pursuing an almost due westerly course; tunnel B, at least, running over six hundred feet—and all ending among the stopes, uniting these tunnels at their westerly ends. Not one tunnel indicates a lead in the direction of what the defendant claims as the apex of its mining claim; but all of them do indicate an extension of the mineral belt or zone westerly, at almost right angles from the defendant's outcrops, longitudinally with the side lines of plaintiff's claims, through and westerly of the point reached by the plaintiff's shaft, from what is called the "discovery point" of the Apex claim, the bedrock or floor of the whole system rising slightly from the outcrop on the Sierra Nevada as the system, zone, or mineral belt and the defendant's tunnels reach to the

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Opinion of the Court—Beatty, C. J., Specially Concurring.

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westward. Another fact, heretofore mentioned, has proof positive in the several elevations of these tunnels—namely, that the dip of the floor of this mineral belt or zone is from north to south. The elevation at the mouth of tunnel B is three thousand four hundred and fifteen feet. One hundred and fifty feet northerly, at the mouth of C, the rise is twenty-three feet. At D, one hundred and twenty-five feet farther, the rise is eleven feet. From D to C, one hundred feet farther north, it is twenty feet. So that the rise from B to C—a distance, by inspection, of the map, of about three hundred and seventy-five feet—crossing this mineral belt, is fifty-four feet; and as far west as these tunnels go along this belt the same relations in the elevations of the southern portions seem to be maintained. This also corroborates the evidence of some of the witnesses, and is consistent with plaintiff's claim.

From these and other like facts, it seems to us as plain that defendant shows no reason whatever to justify it in extending its works, and extracting the ore in this mineral ground west of its own side line of the Sierra Nevada claim, and within the boundary lines of the plaintiff's mining claim. The order denying the injunction should be overruled, and a temporary injunction should issue, as prayed in the complaint. It is so ordered.

BEATTY, C. J., Specially Concurring.—Upon the record we have in this matter, were it a hearing upon the merits, I would hesitate to agree to a reversal; for, from the examinations I have been able to make of the testimony, I think its weight seems to be with the defendant. This, however, is not to settle the title to the ground in controversy, but only to preserve its value until that title can be settled upon full hearing. Admitting the defendant is right, the inconvenience to it from an injunction will be less than would be the damage to plaintiff should he prove to be right. Always, in questions of injunction on the working of mines, the doubt should be resolved in favor of granting the writ. There is evidence for and against plaintiff's claim of a ledge in his Apex ground, and in the shaft therein; but the undisputed fact, which with me is almost controlling, is that the various workings of the Sierra Nevada show a nearly flat vein, with a much more decided dip to the south than to the

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Opinion of the Court—Sweet, J., Dissenting.

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west, which so far sustains plaintiff's theory that the vein runs easterly and westerly, instead of mere northerly and southerly as defendant claims. At the same time it must be admitted that, from all the facts before us, the general course of the great principal vein through the country, for miles, is as defendant holds. Whether that dip to the south may be from some dislocation of the ledge, from neighboring dikes, or other causes—may be a part of another cross-ledge—I do not undertake to answer. The simple fact is, it is there; and, until clearly explained as only the result of some dislocation of the ledge, and not its true dip, I think plaintiff should be protected. I do not agree to any suggestion that these workings are a part of a wide vein, on the zone theory. While it may so prove, I do not think the facts before us so show; and I will not indulge in any theory. My concurrence in reversing the order refusing the plaintiff an injunction is based alone upon the reasons I have here stated.

SWEET, J., Dissenting.—The plaintiff is the owner of what is termed the "Apex mining property," situated in Yreka mining district, Shoshone county, Idaho. This property is composed of three claims, called the "Tip Top," "Apex," and "Rambler." The defendant, a corporation, is the owner of the Sierra Nevada mining claim. The properties of plaintiff and defendant join, the three first-named claims lying along the west side line of the Sierra Nevada. Plaintiff asks that a writ be issued, restraining the defendant from mining and extracting ore from within the grounds of the Rambler mining claim. Defendant admits that it is extracting ore from within the lines of the Rambler, but avers that it has a lawful right so to do, by reason of the alleged fact that in crossing the west side line of the Sierra Nevada, and entering the ground of the Rambler, it is following a vein upon its dip, the apex of which is within the boundary lines of the Sierra Nevada. Plaintiff admits that, if defendant is following a vein upon its dip, the apex of which lies within the defendant's lines, it has a perfect right so to do, but avers that defendant is not following the vein upon its dip, but upon its strike. It is conceded by counsel that the vein in controversy is situated on or is a part of the great mineral ledge or vein beginning with the Sullivan, in Milo gulch, and extending to the Eureka, in Government gulch, a distance of about two

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miles. Both sides appeal to the same authorities, the same cases, and, one may almost say, to the same facts. Maps have been filed and witnesses have been examined touching every phase of the controversy; but, after a careful consideration of the entire matter, partly from the evidence and partly from the maps, acknowledged by both parties to be correct, I find myself unable to assent to nearly all the conclusions presented in the opinion just rendered, and believe it to be my duty to dissent from the same at some length.

If the general strike or trend of the vein is in an easterly and westerly direction, it must necessarily cross the side lines of the Sierra Nevada on its strike; and, if it so crosses the Sierra Nevada on its strike, it must pass through the Apex property on its strike, and its true dip would, under the showing made, be to the south. If, on the other hand, the general strike or trend of the vein is north and south, and admitting that it crosses the Sierra Nevada in a northwesterly and southeasterly direction, then, as a matter of course and as a matter of fact, its true dip could not be either to the north or south. It must be either to the east or west, or to the southwest or northeast, depending upon the question as to whether there is a considerable variation in the vein from a direct course of north and south. It is not necessary for me to deal extensively with the authorities cited, for the reason that no serious legal propositions are in dispute. As before stated, it is almost entirely a question of fact; certain legal propositions being, perhaps, more or less involved.

I cannot assent to the conclusion that it is the duty of the defendant to show that plaintiff is not the owner of the surface ground embraced within the lines of the Rambler. I believe the correct determination of this phase of the question to be as follows: Plaintiff must show, by a preponderance of evidence, that he is entitled to the writ asked for by reason of his ownership of the ground, and must also prove his ownership of the ground by a preponderance of testimony. Having established his title to the Rambler (sufficiently, at least, for the purposes of this action), and thus becoming the legal owner, *prima facie*, of all ore found within its boundary lines, it would devolve upon defendant to show by a preponderance of testimony that it was

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authorized to cross its own side line into the ground of the Rambler. I am, therefore, disposed to consider the right of the defendant to enter the ground of the Rambler solely from two standpoints: First, and principally, as to whether defendant is following the Sierra Nevada vein upon its dip; and, second, the validity of the Rambler location—the latter question being hereinafter discussed from the standpoint raised by counsel for plaintiff, upon what must be termed a theory of the case, but a theory that has been implicitly accepted and relied upon in the decision just rendered.

The court in this instance would not, of course, try the title to the surface ground of either of the properties involved. It would devolve upon the plaintiff, however, to show *prima facie*, a valid location; and this must depend, first, upon a valid discovery, otherwise plaintiff would simply appear on behalf of the United States to enjoin the defendant from mining in ground that did not belong to it, or from unlawfully following its vein beyond its side lines. Such a position is not assumed by plaintiff, but reliance is placed upon the *prima facie* discovery.

Plaintiff seems to rely upon two theories, as nearly, at least, as I am able to ascertain his exact claim. One is that his location is based upon the actual discovery of the Sierra Nevada vein, as the term "vein" is commonly understood, within the lines of the Apex; and that the Sierra Nevada location was made upon the same vein as it extended in an easterly and westerly direction through the ground covered by the Sierra Nevada location. It is also proposed to place this case within the rule laid down in *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Saw. 302, Fed. Cas. No. 4548, reprinted in 9 Morr. Min. Rep. 578. At least, whether plaintiff relies upon the *Eureka v. Richmond* decision or not, the opinion presented is based upon that theory. This may be due to the fact that counsel for plaintiff, during his very forcible presentation of the case, always referred to the vein as a zone or belt. In the opinion rendered, it seems to be treated as a zone or belt. The conclusion must be reached, not from the evidence submitted in the case, but from the declarations of counsel. This theory is that what has heretofore been called a "vein," extending from the Sullivan location in Milo gulch to the Eureka location in Government gulch, is



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a mineralized belt or zone, and that a location made on this belt is a location within the law; and that, therefore, a location within the boundary lines of the Apex was valid, whether any ore body located in or extending through this belt came to the surface at that point or not. In *Eureka Con. Min. Co. v. Richmond Min. Co.*, Justice Field, speaking for the court, defines the meaning of the word "lode," as used in the act of Congress, as follows: "But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

Having defined a "lode," within the meaning of the act of Congress, to be, under some circumstances, a zone or belt of mineral, Justice Field discusses the vein in controversy in the *Eureka-Richmond* case, and says: "We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness, and on its north side, for a like extent, by a belt of clay or shale ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam less than an inch in width. From that point they diverge until, on the surface in the Eureka mine, they are about five hundred feet apart; and on the surface in the Richmond mine, about eight hundred feet. The quartzite had a general dip to the north at an angle of about forty-five degrees; subject to some local variation. As the course changes, the clay or shale is more

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perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked, they are now only from two to three hundred feet apart."

Thus, in the Eureka case, we have a belt of mineralized limestone, lying between formations of quartzite and shale. The ore is found in pockets or bodies, regardless of any uniformity in course, except as to the general course of the entire belt. Justice Field also defines a "lead" to be a vein or seam or strata indicating mineral, and, followed by the miner, takes him to the body of ore he seeks. Of course, it is understood that this vein or seam or strata must be in place; and by being "in place" it means that the mineralized substance, whatever it may be, is presented in a separate and distinct form from that which lies upon either side of it; although, perhaps, it is not necessary for the discovery that both walls be perfectly defined, and the vein, as a fissure vein, be perfectly demonstrated.

Plaintiff does not pretend that he has a vein of pay ore from the surface in the Apex ground to the point where the workings of the Apex come in conflict with those of the Sierra Nevada. He claims a seam of mineralized talc, iron, and quartzite, considered by him as an indication of ore, and that, as a miner, he believed would lead him to ore. Starting on this seam at the surface, he followed it until he reached the workings of the Sierra Nevada, and he therefore claims that the finding of ore justified his theory in following the indications mentioned. To justify the location of material of this sort in the mind of a practical miner, and in the absence of knowledge on his part that he would find a body of ore by sinking the shaft, whether he had indications of mineral or not, it is doubtful if he would expend very much money in following such an indication, unless it lay between well-defined walls, and was, in fact, a fissure vein. Then he would spend a large or a small sum of money, depending upon how strong the indications were, and whether or not he might be an adventuresome or a very conservative miner. In this case the plaintiff was bound to discover the ore, because the defendant was already taking it from the ground beneath his shaft; and, as a matter of course, it was only a ques-

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tion of the depth of the shaft until the ore body would be reached. I am of the opinion that this position is not consistent with the other claim made by plaintiff—that the Sierra Nevada is a well and clearly defined ledge, extending in an easterly and westerly direction, crossing the Sierra Nevada, and entering the ground of the Rambler upon the strike of the vein, instead of upon its dip. It is hardly possible that the two conditions can exist. If this entire quartzite belt is similar to the belt or zone described by Justice Field in *Eureka Con. Min. Co. v. Richmond Min. Co.*, then the Sierra Nevada can be but a pocket or chute of ore in that belt. Messrs. Burke, Clement, and Porter agree that, in examining the underground workings of the Sierra Nevada, whatever its course or dip may be, they found a perfect vein, with perfect walls, and in the judgment of each it was a complete and genuine fissure.

Again, the quartzite belt is not sufficiently defined by any of the witnesses to authorize a court in sending the question to a jury on that issue. There must be something more to this belt to make it a mineralized zone, within Justice Field's decision, than iron-stained quartzite. By the witnesses referred to, the Sierra Nevada vein is described as a very strong and powerful one. That it should stain the adjoining rock for a greater or less distance along its entire course is not at all remarkable, and would, perhaps, be expected. In defining the character of this fissure, the witnesses describe it as being incased within walls of quartzite, with a gangue between the ore body and the walls. The only thing to indicate that it is a part of a belt is that both walls are of quartzite, and this only demonstrates that it is not a contact vein.

To return to the theory that it is a belt or zone of mineral, composed of many veins and deposits, it must be borne in mind that no witness has defined it. In the Eureka case, the mineral belt, which was held to be a zone, was confined within well-defined walls of quartzite and shale; and the only thing remarkable about the vein in that case was its extraordinary width and narrowness at different places. There is no evidence whatever as to the well-defined limits, or as to the lead in question being incased between walls of any character. Proceeding on this theory, the plaintiff followed a seam composed of talc, iron, and

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mineralized quartzite from the surface in the Apex to the point where he came in conflict with the workings of the Sierra Nevada, within the Rambler lines. Plaintiff had the lead, but where did it lead him? It led him to a body of ore. To what body of ore? To the Sierra Nevada, which had been followed from the surface, where the outcropping was plain and undisputed, to the point where plaintiff's workings came in contact with the ore. The defendant, to be sure, had crossed the side line of its claim; and this brings us to the second phase of the case. In crossing the side line, was it following the vein upon its dip, or upon its strike? And thus the two questions of fact in this very important case are before us.

In passing from the belt or zone theory of the plaintiff (if it may be said that the plaintiff has any such theory), which is, that a location anywhere on the belt, outside the lines of any other valid claim, is good, I can state that, if plaintiff had established a case sufficient to bring the issue at bar within the rule laid down in *Eureka Con. Min. Co. v. Richmond Min. Co.*, this investigation would assume more difficult proportions. Within the zone or belt theory, a location was made upon the Apex and Rambler. The examination of the witnesses shows that the discovery amounted to iron, manganese, and iron-stained quartzite. So far as any evidence has been introduced on the subject, such is the general character of the entire mountain. Again, I say, whether this mountain is in itself a vein, lying between distinct formations and containing different veins and pockets, as in the *Eureka-Richmond* case, there is not sufficient evidence to show; and, unless it does come within that rule, it is clear that no valid discovery was made on these claims lying to the west of the Nevada, unless the course of the vein is east and west, and not northwest and southeast. Under the theory adopted in the opinion just submitted, the location of the Apex is valid, because, if I correctly understand it, it is higher on the surface of the mountain than the location in the Sierra Nevada. Carrying out this theory, if the entire mountain is a vein, the one who finally locates on the very summit has the apex of the vein. Three or four locations of this character, if such reasoning be correct, will secure all the ore in the Coeur d'Alene.

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Defendant contends that the Sierra Nevada vein, as located, constitutes a vein, within the meaning of the law; not as contemplated in the Eureka-Richmond case, but that it is a true and complete fissure, and in no sense a part or portion of such a belt as is defined in said case. Each and every witness testified that this vein was perfect in every particular. Its perfection and completeness were emphasized by witnesses supposed to be interested with, or in sympathy with, both plaintiff and defendant; and, as already stated, on all of the evidence presented, I am forced to the same conclusion, and think no court justified in accepting the zone or belt theory for any purpose whatever. What the future may develop I am not here to decide. Plaintiff and defendant agree that the Nevada vein, whether it be a mineralized zone or belt, or a distinct fissure vein, as commonly understood, is a part of the great vein of mineral extending from the Sullivan to the Eureka, a distance of about two miles. Both parties admit that the true dip of a vein is at right angles to its true strike; and, as a matter of course, the converse must be true. If, therefore, the dip can be obtained, there is no difficulty in settling the true strike or course of the vein; and, on the other hand, if we can obtain the true course of the vein, it would settle the true dip. The parties to this action agree up to this point.

Plaintiff, however, maintains that the true dip can and should be ascertained from the workings within the Sierra Nevada. The defendant relies upon what the workings in the mine demonstrate, as well as upon the well-known course of the vein. I am of the opinion that the true dip of this vein may be more correctly ascertained by examining the map showing the general course of the vein along its entire known length, in connection with the workings, than by attempting to settle it from the dip in the comparatively few feet exposed in the workings of the Sierra Nevada.

It is claimed by plaintiff that the general course is easterly and westerly; and by the defendant, that it is northwest and southeast. Plaintiff urges, in vindication of his theory, that, while the vein dips to the southwest, it dips to the south more than to the southwest, and that this fact is demonstrated by the

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entire workings in the Nevada. Defendant admits that, at the place indicated, the dip is more to the south than to the southwest; but claims that, inasmuch as the course of the vein is in a northwesterly and southeasterly direction, the dip to the south is but a wave in the vein, for the reason that it is impossible for a vein running northwesterly and southeasterly to dip to the south, because the dip, as both admit, must be at right angles to the true course. Mr. Clement testified that the course of the vein through the Nevada was north and south, by forty degrees west. Mr. Gibbons testified that the vein crosses the west side line of the Sierra Nevada at right angles. If this be true, the position taken by plaintiff is correct. Without going into a consideration of the evidence upon this point, I must conclude, from the croppings, as they appear, without dispute, along the surface of the Sierra Nevada claim; from the fact that on the line drawn from the Sullivan to the Eureka the general course or trend of this vein would be northwest and southeast; from the fact that it dips to the southwest with as much uniformity as to the south—that it cannot cross the west line of the Sierra Nevada at right angles, and that its true dip would not be to the south, notwithstanding it may thus appear from the tunnels now run upon the footwall within the Nevada claim.

Conceding that the true course of this vein is northwest and southeast, the true dip, at right angles with that course, would be southwest; which would certainly be parallel with the Nevada end lines, making said end lines practically at right angles with the true course of the vein, and the side lines substantially parallel therewith. This conclusion as to the dip and strike of the vein is based upon taking into consideration the entire course of the vein between the points indicated, the statements of witnesses, and the admissions of counsel. I do not believe the true dip of this vein can be ascertained from the underground workings in any one mine on its course, at the depth as yet attained by any of these properties. No doubt the entire vein runs in waves, as it crosses gulches and climbs mountains, until it straightens up under the mountains, or passes beyond the effect of surface disturbances.

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Points decided.

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My conclusions are: 1. If the vein in question does not come within the rule laid down in the Eureka-Richmond case, the Rambler location is void. There is no proof whatever that the mineralized belt, or portion of the mountain upon which the Rambler is located is incased within walls; or, in other words, that it constitutes a lead, lode, or vein, within the meaning of the rule laid down in the Eureka-Richmond case. Indeed, the showing as to the completeness of the Sierra Nevada vein is overwhelming; and upon that question, as the evidence now stands, it would be impossible to send the issue to a jury. 2. The true course of the vein being, in my judgment, northwest and southeast, it is impossible that its true dip could be a little east of south; and, as it is conceded that the vein crosses the south end line of the Nevada, it is impossible that it should cross the west side line at right angles. Under the showing made, the true strike must be practically at right angles with the end lines of the Nevada. I have dissented at considerable length, because I deem the conclusions reached so far from the merits involved in the issue at bar as to be dangerous to the property interests of the community, in the absence of a demonstration of the theory set forth and adopted in the opinion just rendered.

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(March 6, 1890.)

## DULANEY v. BURKE.

[23 Pac. 915.]

**PROMISSORY NOTE—AGREEMENT TO CANCEL—PAROL EVIDENCE.**—D. purchased mining property, deeded one-sixth interest to B. B. executed and delivered to D. his note due one year after date for \$4,308.80, his share of the purchase price. At the same time D. orally agreed that at any time before maturity of the note he would accept from B. a reconveyance of his interest and cancel the note. In a suit for the collection of the note B. set up the oral agreement as a defense; held, that as such oral agreement tended to establish a contract different in form, purpose and effect from the written contract, and not based on want of consideration, fraud or mistake, the said oral agreement was inadmissible as evidence to vary the terms of the note or defeat it.

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Argument for Respondent.

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## APPEAL from District Court, Shoshone County.

Woods &amp; Heyburn, for Appellant.

The conveyance of the mining property to the defendant was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant that the land was afterward to be conveyed back in the event of certain contingencies, and that the note was given at the time under an agreement that it was not to be paid. This fact was sought to be proven by the defendant, and the court below refused to admit the evidence. The answer raises this defense squarely, and in law it was a good defense, and the refusal to receive the evidence was error. (*Schindler v. Muhleiser*, 45 Conn. 153; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Benton v. Martin*, 52 N. Y. 570; *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. 834; *Maltz v. Fletcher*, 52 Mich. 484, 18 N. W. 228; *Colman v. Post*, 10 Mich. 422, 82 Am. Dec. 49; *Catlin v. Birchard*, 13 Mich. 110; *Bowker v. Johnson*, 17 Mich. 46; *Clarke v. Tappin*, 32 Conn. 66; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145.)

Albert Hagan and Frank Ganahl, for Respondent.

In an action upon a note which is absolute upon its face, no evidence can be produced by parol that it should only be paid on a certain contingency. (*Swank v. Nichols*, 24 Ind. 199; *Schurmeier v. Johnson*, 10 Minn. 319 (Gill. 250); *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Myers v. Sunderland*, 4 G. Green. 567; *Cunningham v. Wardwell*, 12 Me. 466; *Boody v. McKenney*, 23 Me. 517.) A verbal contract made at the time a promissory note is executed, varying the terms of the note, cannot be set up to defeat a suit on the note. (*Calhoun v. Davis*, 2 Ind. 532; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Burge v. Dishman*, 5 Blackf. 272; *Mahan v. Sherman*, 7 Blackf. 378; *Columbia v. Amos*, 5 Ind. 184; *Tucker v. Talbott*, 15 Ind. 115; *Nill v. Comparet*, 15 Ind. 243; *Williams v. Beazley*, 3 J. J. Marsh. 577; *Cole v. Hundley*, 8 Smedes & M. 473; *Barton v. Wilkins*, 1 Mo. 74; *Anspach v. Bast*, 52 Pa. St. 356; *Daniel v. Ray*, 1 Hill (S. C.), 32.)



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Opinion of the Court—Sweet, J.

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SWEET, J.—On August 10, 1883, at Salt Lake City, Utah, John M. Burke executed and delivered a certain promissory note in the sum of \$4,308.80, with interest at the rate of six per cent per annum until paid, due one year after date, and payable to H. Grafton Dulaney, or order. Before the maturity of said note defendant, Burke, became a resident of Idaho territory, and on the seventh day of October, 1887, plaintiff commenced an action in the district court of Idaho territory, first judicial district, in and for Shoshone county, for the collection of said note. Defendant sets up as a defense in said action an oral agreement, made at the time of, or prior to the execution of, said note, the substance of which is as follows: "That plaintiff was about to consummate the purchase of two mining claims, and desired the defendant to become the superintendent or manager thereof. To this proposition defendant replied that he did not care to enter into such an arrangement, unless there was something in it for him. Plaintiff thereupon offered to purchase the property, giving to defendant a one-half interest therein, the defendant to execute to plaintiff his promissory note for one-half the purchase price of said property, at the same time giving to defendant an opportunity to examine and test said mining property; and further agreeing that if, after such examination, defendant did not desire to pay the note, and retain his interest in the property, he might surrender said interest to plaintiff, and that, upon surrendering this interest, plaintiff would cancel defendant's note given therefor. That, in accordance with this agreement, plaintiff purchased the property, taking a deed therefor in the names of plaintiff and defendant. That afterward defendant did examine and test the mines thus purchased, and concluded that he did not care to retain his interest in the same, and notified plaintiff that he was ready to execute a deed in favor of plaintiff to his interest in said mines whenever plaintiff would cancel said note. Wherefore, he prays judgment against plaintiff for the cancellation of said note, and for his costs," etc.

At the trial defendant offered to prove said agreement, at the same time tendering a deed to the property, and plaintiff objected to the introduction of evidence to such effect, on the

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ground that it was an attempt to vary the terms of a written contract by parol evidence. The offer thus made was tendered in various forms, and always met by the same objection; and this objection, for the reason above set forth, was sustained by the court. The case was tried without a jury, and the court gave judgment for plaintiff in the sum of \$5,692.80. Defendant excepted to the ruling of the court in excluding the evidence by which it was proposed to prove the agreement before mentioned; and the ruling thus made is the error assigned upon which defendant and appellant relies to reverse the order of the court below, overruling defendant's motion for a new trial. Defendant cites *Schindler v. Muhlheiser*, 45 Conn. 153, as an authority in support of his interpretation of the law. Several other authorities are cited by appellant, more or less in line with the case just referred to; but unquestionably *Schindler v. Muhlheiser* is the strongest case presented by the appellant as tending to support his claim in the issue at bar. After stating the facts in this case, the court reaches three separate and distinct conclusions. They are as follows: "1. The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties; 2. That agreement shows that it was not given as evidence of any existing indebtedness, but as a means of accomplishing an ulterior object wholly in the interest and for the benefit of plaintiff; 3. Consequently the note was an accommodation note, the collection of which would operate as a fraud upon the defendant." We need not quote authorities to establish the principle that fraud vitiates any contract. The quotation of authorities upon this proposition is wholly unnecessary; and we repeat what has already been decided over and over by every court that ever considered the question, and what has been declared to be the law by every text-writer discussing it, that any contract may be assailed upon the charge of fraud, mistake, or failure of consideration.

We will now consider whether the case at bar comes within any of these rules, or whether it comes within the rule laid down in the case first cited. Defendant offered to prove that the agreement was made prior to the execution of the note. To this extent it bears some resemblance to the first conclusion reached

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by the court in *Schindler v. Muhlheiser*. But, after all, no contract can be executed before it is discussed in all of its forms and phases, and thoroughly understood and agreed on between the parties; and the execution of a written agreement, or contract, in accordance with such a discussion, would not be a fulfilling of an antecedent agreement. It is simply placing the agreement in writing, and thereafter the contents of the written agreement are to bear witness as to the intent of the parties. Beyond this first conclusion, however, the facts ascertained by the court in the case cited do not apply to the matter at bar. It was there found that the note was executed "wholly in the interest and for the benefit of the plaintiff." The note having been executed for the benefit of the plaintiff, it was further found to be an accommodation note, and that its collection would operate as a fraud upon the defendant. There is nothing in this case to indicate such a condition of affairs. Defendant desired "a show to make something for himself." By what course of reasoning are we to conclude that it was to the benefit of plaintiff to pay defendant's half of the purchase price of the property, and accept defendant's note therefor? How did that become an accommodation to the plaintiff? How could plaintiff perpetrate a fraud upon the defendant by advancing the latter's half of the purchase price of this property, and carrying it for him during the time specified in the note? If we were to speculate outside the written conditions of the agreement, we might say that there was more danger of plaintiff giving defendant an opportunity to watch the development of the mine for a year, and then, if the progress of the work was such as to discourage its owners, permit him to repudiate the contract, then there would be danger of fraud upon the defendant by generously advancing the money to carry his portion of the purchase price.

Now, let us consider the conditions under which parol evidence may be admitted to vary the terms of a promissory note. In *Schurmeier v. Johnson*, 10 Minn. 319 (Gill. 252), the court, in discussing this question, says: "It is a rule well settled that, in the absence of fraud or mistake, parol evidence is inadmissible at law or in equity to vary a written contract. Such a contract

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cannot be varied, explained away, or rendered ineffectual by parol proof of any conversation or stipulation prior to or contemporaneous with its execution. It is conclusively presumed to set forth the whole agreement of the parties, and the extent and manner of their agreement." Does defendant allege fraud as a reason why the plain terms and conditions of this note should not be executed? Does he aver a failure of consideration? Does he allege a mistake? These are the only grounds upon which the plain and specific utterances of a written agreement may be assailed and set aside. Not one of them comes within the proof tendered by defendant at the trial. He admits the execution, admits the consideration, admits the execution of the deed in his own name, admits that the note calls for the sum agreed to be paid for the property. Clearly, then, he is not within the rule which authorizes a court to set aside the provisions of a written contract upon the ground of fraud, mistake or failure of consideration. What, then, does he plead? He sets up, in effect, that the agreement is not all in writing, and asks permission to add to the contract signed by him on August 10, 1883, by inserting a condition concerning which the contract is absolutely silent. It is vain to say that these offers do not tend to vary the terms of the written agreement. An agreement for an option to purchase this half interest would have been as different in substance and in effect from the agreement actually before us as it is possible to make one contract different from another. Contracts cannot be added to or taken from in this manner. In *Brown v. Spofford*, 95 U. S. 480, this question is directly passed upon by the court. We quote from the decision: "Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence. And that proposition is universally true where a promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for nonpayment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument." The court then states the issue involved in *Brown v. Wiley*, 20 How. 442, and approves the same. Further on, in the same case (page 481) the court say:

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Opinion of the Court—Sweet, J.

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"Attempt was made in a leading case to prove that the payee agreed with the indorser that if he would indorse the note he should incur no responsibility, as the payment was secured by collaterals, and when offered in the circuit court the evidence was admitted; but the court, when the case was brought here on a writ of error, reversed the judgment, holding that the evidence should have been excluded": Citing *Banks v. Dunn*, 6 Pet. 51. Continuing, and on the same page: "Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract." (*Specht v. Howard*, 16 Wall. 564.) In the same case the court indorses the quotation already made from 10 Minn., in the following language: "In the absence of fraud, accident, or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing a bill or note cannot be permitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract": Citing *Forsyth v. Kimball*, 91 U. S. 291.

Defendant contends that the payment of this note was dependent upon a condition, or that its delivery was dependent upon a condition, it matters not which. There is nothing conditional about the written agreement. It states clearly and specifically what the maker of the note promises to do. There is no condition about it; and if there was an agreement entered into at the time that defendant might do something else at his option, it would be a plain contradiction of the terms of the instrument itself. Quoting further from *Brown v. Spofford*, 95 U. S. 482, we find a declaration directly upon this point: "Parol evidence of an agreement made contemporaneously with a promissory note, which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition." Authorities in support of this principle might be continued indefinitely. Those cited have been referred to, not so

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much to establish the principle, because it is conceded by both parties in the matter at bar, as to show, from the similarity of questions involved in the cases referred to, the erroneous position taken by defendant. Therefore, as the evidence rejected by the court below tended to establish an oral agreement different in form, different in purpose, and different in effect from the written contract in issue, and as the effort to change those conditions is not based upon either a failure of consideration, fraud, or mistake, we hold that the court below did not err in refusing to admit the testimony, and that the judgment must be affirmed.

Beatty, C. J., concurs.

BERRY, J., Dissenting.—This is an action upon a promissory note, made by the defendant to this plaintiff at Salt Lake City, Utah, August 10, 1883, payable one year after date. The action is between the original parties to the note. The complaint is in the usual form. The amended answer sets up that “the note mentioned and set forth in the complaint was given for the consideration and under the conditions following, to wit: On the tenth day of August, 1883, the plaintiff had negotiated the purchase of the two mining properties at, etc., territory of Utah, being the undivided half of the properties known as the ‘Live Yankee’ lode claim, and the ‘Mary Ellen’ lode claim, of M. Cullen and Dennis Ryan, and orally agreed with this defendant that he would purchase the said properties, and give this defendant the option of becoming the owner of the undivided one-sixth of each of said claims, for the same price which plaintiff paid for said interests, to be paid by the defendant to the plaintiff one year after date, in the event the defendant should desire to become the owner and purchaser of said interests. The defendant thereupon agreed to accept such option of purchase, and the plaintiff thereupon bought the said property.” That in the consummation of the purchase of said properties, at the instance solely of plaintiff, the conveyance therefor was taken in the joint names of plaintiff and defendant, and plaintiff requested defendant to give his note for his share of the purchase price, the same being the sum of \$4,308.80, as set forth in the note declared to be payable one

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year after date, and then and there agreed with defendant that defendant could explore, work, and develop said mining claim; and if at any time before the maturity of said note defendant desired to do so, he could relinquish said option of purchase, and the plaintiff would cancel said note, and accept a reconveyance of the interests so deeded to defendant in said mining claims in full discharge of said note, and cancellation thereof, and defendant accepted the conveyance of said claims, and executed said note upon the agreement aforesaid, and the consideration of said note was none other or different. That the defendant pursuant to said agreement, entered upon and explored the property, and within the year notified the plaintiff that he was dissatisfied with, and declined to take, the property, relinquished his said option, and in March, 1884, notified the plaintiff of these facts, "and proffered his readiness and willingness to convey the interest so appearing in his name upon demand, at his own expense, and thereupon vacated the property to the plaintiff, who entered upon and worked the same." The defendant avers readiness to convey the interest to the plaintiff, and tenders a deed thereof.

Upon these issues the case was brought to trial before the court, without a jury, December 18, 1888, and judgment was rendered for the plaintiff in the sum of \$5,692.80. Statement of a case for new trial was duly made, the motion was denied, and defendant appeals from both the judgment and order denying a new trial.

The assignments of error are, in substance: 1. The findings of fact made by the court are contrary to the evidence; 2. Errors of law arising on the trial, duly excepted to.

It is only necessary to consider this second ground of error, for, if this charge is sustained, the former follows of course. As stated above, this case is between the original parties to the transaction, stripped of all questions of the right of innocent holders of commercial paper. The agreement on which the defendant relies, aside from the note itself, is alleged in the answer to have been entirely by parol. This alleged parol contract is that, prior to the making of the note, the plaintiff was negotiating for certain mining property, and that the plaintiff agreed to purchase the property, and give to the de-

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defendant a year's option of becoming the owner of an undivided part of the same, at the same price the plaintiff was to pay for it; the defendant to have one year to explore and work the property, to determine whether he would become such owner; that in consummating the purchase the plaintiff, of his own motion solely, took the title in the name of both of these parties; that the defendant, with knowledge that the property had been so deeded, at the request of the plaintiff, gave the note in suit, but that, as a part of the transaction, it was further agreed that if at any time within the year the defendant chose to relinquish his option of purchase, the plaintiff would cancel the note, and accept a conveyance of the interest of the property so deeded to defendant, in full discharge of said note and cancellation thereof. The defendant accepted the conveyance, and made the note upon such agreement only.

The allegations of the answer must be taken together, and, if shown as stated, the plaintiff never became the owner of this note, and entitled to enforce the same against the defendant. The full consideration of it never passed to the defendant. He had not purchased the property, and some months before the expiration of the time which he had to explore and work the mine, and make up his mind whether he would take it, he determined not to take it; so notified the plaintiff, left the mine, and the plaintiff enjoyed possession of it. The contract of purchase was never consummated. As to that, the minds of the parties never met. This case results from the peculiar mode adopted by the plaintiff in giving an option upon this property. From the evidence it seems that the plaintiff had his own way in the peculiar manner in which the option was given. Instead of taking the title in his own name, the plaintiff, in taking it, of his own choice, took it to each of the parties jointly. It appears in the evidence that the motive of the plaintiff in desiring to associate the defendant with him in the mine was to have his services in its management and working. Even if he insisted on the note as security that the defendant, if he refused to buy, would reconvey the title, of which there is no pretense, that makes the plaintiff's position no better. The note would be only as security on the defendant's refusal to reconvey. It was still but the sale of an option. The note



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was not given for the land; the maker had not then agreed to take the land. But it was given for another, and a merely temporary, purpose. The simple and only question is, May the fact be shown that the note was only an incident to an incomplete contract by parol?

It is contended by the plaintiff that to allow such showing would be a violation of the rule that parol proof cannot be given to contradict or vary the terms of a written agreement. There is some conflict in the authorities as to what shall be deemed to change the terms of an instrument; but the plain words of the rule itself are as near an expression of its meaning as we can hope to have. Chancellor Kent (2 Kent's Commentaries, 556) says that "it is an inflexible rule that parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a contract in writing. That would be the substitution of parol for written evidence, under the hand of the party; and it would lead to uncertainty, error and fraud. Parol evidence is received when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal, for it then shows that the instrument never had any valid operation; and this rule is supported on grounds of policy and necessity." The contention is, in the case at bar, that the writing purporting to be a contract was in fact not a contract at all; that it was not made as a contract, but only as an incidental part of a transaction, mostly by parol, which might or might not become a contract; that, as it stood, it was without consideration; that the conditions on which it might become a contract never occurred. The defendant disavows any intention in any manner to vary the terms or words of this instrument. Many cases are cited, but none of them make the rule any plainer than it is as here stated. Few, if any, of these cases go the extent of denying that the consideration of a note in the hands of the original payee can be inquired into. In the hands of *bona fide* holders without notice, the case may be different; but that depends on other considerations. In *Kennedy v. Goodman*, 14 Neb. 588, 16 N. W. 834, the court say: "The law is now well settled that in an action against a party to a negotiable instrument, by his immediate promise, a want or failure of consideration is a good defense.

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It is unnecessary to cite authorities on this point, because there seems to be no conflict." We are especially cited to decisions of the supreme court of the United States, because of their controlling authority over this court; but on examination all of those cases presuppose a valid contract foundation for the instruments there in question. In *Brown v. Wiley*, 20 How. 444, the action was upon a bill of exchange, payable one year after its date; but by the laws of the state where it was made, and where it was sought to be enforced, it became due at once on its acceptance being refused. It was regularly presented, according to law, and, being dishonored, suit was at once begun. Defendants set up a different agreement as to the time of presentment than that prescribed by law, and deducible from the terms of the bill; and the court held that such parol agreement was inconsistent with those terms. In its decision the court say in reaching its conclusion: "It is admitted the bill was given for full value," and the question is presented, "whether parol evidence should have been received to vary, alter or contradict that which appears on the face of the bill of exchange." The contract was perfect, the obligation to pay at some time conceded, and its own terms, construed by the law, fixed the time. This holding is consistent with the argument of this defendant, or at least it does not preclude his claim. To like effect, *Banks v. Dunn*, 6 Pet. 56; also *Specht v. Howard*, 16 Wall. 564. So in *Brown v. Spofford*, 95 U. S. 474. So in *Isaacs v. Elkins*, 11 Vt. 679. The latter case was upon a note regular upon its face for money, but in defense to which the defendant offered to prove that it was in reality given as a chattel note, and not for money; and the court very properly held the evidence inadmissible. The reason is obvious, and the rule in that and in all similar cases must be conceded. Numerous authorities are cited from state courts, some of which would entirely exclude the defense in this case; but we do not find that the United States supreme court intended to go beyond the cases cited from it.

On the other hand, in many of the leading states of the Union, a doctrine admitting this defense is the settled law. The question involved is not one to be affected by mere numbers of adherents to either view. That side that has the more

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cogent reasons, which is most in harmony with natural right and justice, must ultimately prevail. Temporary or local considerations, founded on the nature of business transactions, in any particular time and place, cannot affect it. It is said that to admit this defense will open the door to false swearing and fraud. That may be a ground for legislative action, but we cannot indulge the presumption that to prevent perjury the laws must be so construed as to deny men the opportunity to commit it. If men will avail themselves of an opportunity to perjure themselves, opened by a rule of law for the necessary purpose of protecting the unwary and unsuspecting from impositions and frauds, the criminal laws will correct them. The civil law is not made to favor any class of contract breakers, but it is made to shield the honest, the unwary, and the oppressed in their enjoyment of right and justice. The case of *Schindler v. Muhlheiser*, 45 Conn. 153, was in many respects like the case at bar and nearly identical in principle. The note on which that action was brought was claimed by the defendant to be made for the accommodation of the plaintiff, and hence that it was not a debt of defendant to plaintiff. In the decision of that case the court say: "The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties. . . . The plaintiff invokes the familiar rule of law that parol evidence is not admissible to contradict or vary a written instrument. . . . It has for its object the prevention of fraud and perjury, in those cases where the parties have put their contracts in writing, by excluding any other evidence of the terms of the contract than the writing itself. But that is not this case. The contract was not reduced to writing. It was a parol agreement, and provided for the use of the note in suit, and also of the deed [to the defendant] for a special purpose. . . . So far the contract has been performed. But this is not all of it. A further provision in it was that the defendant should reconvey the lands to the plaintiff, and the plaintiff should give up to the defendant his note. This part the plaintiff refuses to perform. He insists that the defendant, contrary to the intention and understanding of both parties, shall retain the land and pay the note. That makes the transaction simply a sale of real estate, when there

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was no sale in fact. It compels the defendant against his will to become the purchaser of this land. Instead of preventing fraud, such an application of the rule would perpetrate a fraud of the grossest character, and bring reproach upon the law, and the administration of justice"; citing *Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303; *Case v. Spaulding*, 24 Conn. 578; *Daggett v. Whiting*, 35 Conn. 366; *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Dale v. Gear*, 39 Conn. 89.

With slight change in verbiage, the words of the court in *Schindler v. Muhlheiser* would apply as well to the case at bar. So in *Maltz v. Fletcher*, 52 Mich. 484, 18 N. W. 228, Chief Justice Cooley says: "It is always competent to show that a contract sued upon is without consideration; and no rule or policy of the law is violated by allowing proof to be made of the purpose for which negotiable paper was given; or that the purpose does not require that payment should be enforced." This case is parallel with one phase of the present case. Maltz sued Fletcher on promissory note, and Fletcher pleaded that it was understood when the notes were given that they were only to be paid if the logs for which they were given should be adjudged, in a certain action then proceeding to test the title to the logs, not to belong to Fletcher. So, in *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145, which was on a promissory note and mortgage the answer alleged that a part of the consideration of the note was an agreement by parol that the plaintiff should procure a highway to be constructed, etc., which he had failed to do. This was demurred to, on the ground that it sets up a verbal agreement, by which defendant attempts to add to or change the terms of the note and mortgage. The court say: "The agreement alleged in the answer did not add to or change the terms of the contract contained in the note, which was to pay the sum expressed therein. That contract is that defendants will pay plaintiff the sum of money named in the notes at the time fixed, with interest. The contract pleaded by the defendants is a distinct and independent contract, which was a partial consideration for the note. It in no sense changes, or adds to the terms of the note, and was not intended so to do. Contracts of this kind, where one is the consideration of another, are common business transactions. It has never been thought by those who made them that the contract,

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which is the consideration, adds to or changes the other; surely the courts never so held." (Citing *Trayer v. Reeder*, 45 Iowa, 272; *Putman v. Halley*, 24 Iowa, 425.) Such a plea goes to the consideration of the note, and behind the cases cited by the plaintiff. So, also, in *Benton v. Martin*, 52 N. Y. 570, which was an action on a duplicate draft by defendant to plaintiff, Judge Folger, in delivering the opinion, says: "Clearly, it was competent to show the terms upon which the duplicate was delivered, and for the defendant to restrict and limit his liability thereby, and to protect himself by them against any liability; . . . and the annexing of such conditions to the delivery is not an oral contradiction of the written obligations, though negotiable, as between the parties to it, or others having notice." In speaking of this rule excluding oral evidence to vary the terms of a written agreement, Chancellor Kent further says: "It is to be observed that the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract than that which is furnished in the writing itself." In the case at bar there is no question as to the language used in the note. The question is only as to the conditions on which it was put in the plaintiff's hands. That the consideration of negotiable promissory notes, the same being concurrent parol agreements, may be inquired into, in an action on the notes, by the promisor against the maker, the authorities are numerous, and sustain the view that any other rule, or any other application of the rule, excluding evidence to vary the language of the contract, would, in the words of the court in *Schindler v. Muhlheiser*, *supra*, perpetrate a fraud of the grossest character, and bring reproach upon the law and the administration of justice"; at least, such result would be likely to follow:

I conclude (1) that the agreement set up in the answer in this case, and sought to be proved by the defendant upon the trial, was proper to be shown; and (2) that parol evidence was competent to show the same; that such evidence was admissible under the pleadings; and that the several rulings of the court below in excluding the same were erroneous. (*Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. 834; *Haynes v. Thom*, 28 N. H. 386.) This judgment should be reversed, and a new trial ordered.

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Argument for Appellant.

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(March 3, 1890.)

## LEWISTON NATIONAL BANK v. MARTIN, SHERIFF.

[23 Pac. 920.]

**CHATTEL MORTGAGE—ATTACHING CREDITORS.**—Under the laws of Idaho a mortgagor may retain the possession of the mortgaged chattels as against attaching creditors by recording the mortgage as provided by statute.

**ATTACHING CREDITORS' RIGHTS.**—Possession of a stock of merchandise by the mortgagor, with power to sell and retail the same, without requiring the proceeds to be applied to the payment of the debt due the mortgagee, is void as to attaching creditors of the mortgagor.

APPEAL from District Court, Kootenai County.

Albert Hagan, for Appellant.

A judgment based upon findings which do not determine all the issues raised by the pleadings is a decision against law, for which a new trial may be had. (*Knight v. Roche*, 56 Cal. 15.) A chattel mortgage reserving the right to dispose of the goods in the usual course of trade is void, and taking possession thereafter by the mortgagee will not cure the fraud. (*Wells v. Langbein*, 20 Fed. 183; *Chenery v. Palmer*, 6 Cal. 120, 65 Am. Dec. 493; *Delaware v. Ensign*, 21 Barb. 85; *Parshall v. Eggert*, 54 N. Y. 18; *Blakeslee v. Rossman*, 43 Wis. 116; *Stein v. Munch*, 24 Minn. 390.) A mortgage of a stock of goods, such as is usually kept for sale in the particular trade of the mortgagor, with provision that the mortgagor may retain possession, and use and enjoy the mortgaged property, is void on its face as to other creditors of the mortgagor; and where the mortgagee knowingly allows the mortgagor to sell the goods, and appropriate the proceeds to his own benefit, the mortgage will be void as to such other creditors, independent of any such provision. (*Davenport v. Foulke*, 68 Ind. 382, 34 Am. Rep. 265; *Peiser v. Petcolas*, 50 Tex. 638, 32 Am. Rep. 621; *Lund v. Fletcher*, 39 Ark. 325, 43 Am. Rep. 270.)

Philip Tillinghast and Hawley &amp; Reeves, for Respondent.

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When the mortgage on its face does not grant any power to the mortgagor to sell or dispose of the mortgaged property, its terms and conditions cannot be contradicted or varied by an unwritten agreement or understanding of the parties had at the time or contemporaneously with its execution. (*Berthold v. Fox*, 13 Minn. 501 (Gill. 462), 97 Am. Dec. 243; *Chenery v. Palmer*, 6 Cal. 122, 65 Am. Dec. 493; *Adair v. Adair*, 5 Mich. 204, 71 Am. Dec. 779.) Statutes providing for the recording of mortgages of personal property are the substitute for possession by the mortgagee, and repel all imputation of fraud which would arise from the want of it. (Jones on Chattel Mortgages, sec. 380; *Berson v. Nunan*, 63 Cal. 550; *Bullock v. Williams*, 16 Pick. 33; *Forbes v. Parker*, 16 Pick. 462; *Shurtleff v. Willard*, 19 Pick. 202; *Hughes v. Cory*, 20 Iowa, 399; *Torbert v. Hayden*, 11 Iowa, 435; *Smith v. Moore*, 11 N. H. 55.) The assignee of a mortgage takes it subject to the equities between the parties of which he had notice, either from the mortgage itself or from other sources. (*Croft v. Bunster*, 9 Wis. 503; *James v. Morey*, 2 Cow. 296.)

SWEET, J.—On the thirty-first day of December, 1887, James McGrail executed and delivered to S. R. Smith a chattel mortgage, as security for three promissory notes, one note for \$319.71 and two for \$717.95 each—the first note payable sixty days after date, and the two latter payable seven months after date—said notes bearing even date with the mortgage above mentioned. The mortgaged property consisted of the contents of a drugstore, including the fixtures thereof, and an apparatus for bottling soda. Among other provisions in said mortgage contained we find the following: “Until default be made in the payment of said sums of money, the said party of the first part, his administrators or assigns, may remain and continue in the quiet and peaceable possession of the said goods and chattels, and in the free and full use and enjoyment of the same.” On January 15, 1888, the mortgagee, Smith, transferred said notes and mortgage to plaintiff herein, the Lewiston National Bank. On March 2, 1888, McGrail sold the entire stock of goods then on hand to the mortgagee, S. R. Smith, who immediately took possession of the same, and car-

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ried on a retail drug business from said stock of goods, together with such additional purchases as he may from time to time have added thereto, until the twenty-sixth day of May, 1888, when, in an action wherein Porter & Co. were plaintiffs and said mortgagor and mortgagee, McGrail and Smith, were defendants, a writ of attachment was issued, under and by virtue of which defendant and appellant, William Martin, as sheriff of Kootenai county, took possession of the goods, wares and merchandise in said store. The action brought by Porter & Co. was prosecuted to a judgment in the probate court of said county; and thereupon an execution was issued under and by virtue of which, on the twentieth day of August, 1888, defendant, as sheriff aforesaid, proceeded to sell the contents of said store seized by him under the said writ of attachment at the time said action was commenced. On the 11th of September, 1888, the Lewiston National Bank, in an action against said McGrail, obtained a judgment in the sum of \$1,623, and an order for the sale of the goods, wares and merchandise described in said mortgage, adding, as a further description thereto, as follows: "Being the property that was in said store on December 31, 1887." Defendant returned said execution, with an indorsement thereon to the effect that, after due and diligent search, he was unable to find the goods and chattels described therein, save and except the said bottling apparatus, which he had seized and sold for the benefit of plaintiff. Thereupon plaintiff brought an action against the defendant herein, the said sheriff, for the sum of \$1,623.31, the alleged value of the goods described in said mortgage. In its complaint plaintiff avers that, by reason of defendant's failure to seize and sell said goods, or, in other words, that by reason of defendant's seizure and sale of said goods under and by virtue of the attachment and judgment above set forth, the plaintiff was damaged in the amount specified, and asked judgment therefor. Defendant, answering the complaint, sets forth the facts already detailed herein, and asks that plaintiff's action be dismissed. Plaintiff obtained judgment in the lower court for the sum above set forth, and defendant forthwith appealed to this court.



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Opinion of the Court—Sweet, J.

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The question presented to this court is as follows: Is a mortgage on the goods, wares and merchandise of a store, under the terms of which the mortgagor continues in possession of said goods, doing a retail business from day to day, valid, as against the attaching creditors of the mortgagor, in the absence of a provision in said mortgage to the effect that the proceeds of said business shall be applied to the payment of the debt due from the mortgagor to the mortgagee? The appellant contends that such a mortgage is not valid as against attaching creditors, and that, in the absence of a statutory provision on the subject, it is fraudulent *per se*. Under the common law, a chattel mortgage of personal property was void, unless the possession of said property was retained by the mortgagee. In many instances, this provision of the law served to prevent the use of many kinds of personal property as security; hence it was that the recording statutes were enacted, and under those provisions the mortgagor was enabled to pledge personal property as security for a debt, and retain possession thereof, provided the mortgage thereon be duly recorded. In common with very many of the states, the legislature of Idaho adopted the recording statute; and under its provisions the mortgagor may give a chattel mortgage upon his property and retain possession thereof, and said mortgage will protect the mortgagee against the attaching creditors of the mortgagor, in the event it is executed in accordance with the provisions of that statute, and recorded as by said act provided. (Idaho Rev. Stats., sec. 3386.) If, under our own statute, however, the mortgagor removes the property mortgaged from the county wherein the mortgage is recorded, or destroys, conceals, sells or in any manner disposes of the property mortgaged, or any part thereof, without the consent of the holder of said mortgage, he is guilty of larceny, and such sale or transfer is void. (Idaho Rev. Stats., sec. 3397.)

It is fair to infer that, while our statute contemplates the act of recording the mortgage as a substitute for the possession of the property by the mortgagee, it also contemplates that the mortgagor shall retain that property in his possession, except the mortgagee permit him to remove or sell the same. That is

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as far as our statute goes, and to this extent only do the laws of our territory cover the case at bar. By the decisions of various states, and by a large majority of them, whenever the mortgagee agrees with the mortgagor that the latter may sell and dispose of the goods mortgaged, without a further agreement to the effect that the proceeds of the sale shall be applied to the payment of the debt due from the mortgagor to the mortgagee, then the recording of said mortgage ceases to protect the mortgagee from the attaching creditors of the mortgagor. In some of the states, a provision in the mortgage to the effect that the mortgagor may dispose of the goods in the usual course of trade is held to be *prima facie* evidence of fraud. In this state the fraudulent intent must be proven. In the absence of a statute of that character, the best authorities are to the effect that such a mortgage is utterly void with respect to the creditors of the mortgagor. The recording act was simply intended to serve as a substitute for possession on the part of the mortgagee. It was formulated in response to the necessities of the commercial world, and to extend and multiply the sources of security for business purposes. Being simply a substitute for possession (and it was never claimed to be anything more), it will not cover any stipulation that might, and doubtless would, in many instances, be resorted to as a shield to protect fraudulent transactions or defeat honest creditors. In *Robinson v. Elliott*, 22 Wall. 524, the court, in discussing precisely the question now at bar, and under a statute very much the same as our own—practically the same—uses the following language: "We are not prepared to say that a mortgage, under the Indiana statute, would not be sustained, which allows a stock of goods to be retained by the mortgagor and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors; but there are features ingrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors.

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They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged." This case is directly in point.

Dr. McGrail was a witness in this case, and, without objection, explained what was meant by the free use of the goods, given him by the terms of the mortgage. That use was to carry on a retail drug business, and, no doubt, his position with the bank, or the position of Smith with the bank, would have been secure so long as the business seemed to be well conducted, and interest on the notes was promptly paid. In *Lyon v. Bank*, 29 Fed. 578, after an exhaustive review of the question now under consideration, the court held that the inference of fraud is an inference of law. The decision from 22 Wall., before referred to, is binding upon this court, and has, we think, been followed by a majority of the United States courts although the United States courts have been very largely influenced by the practice prevailing in the state wherein the question happened to arise. In the absence of a statute on the subject, we are heartily in sympathy with the line of authorities holding that possession of a stock of merchandise by the mortgagor, with power to sell and retail the same, without requiring that the profits shall be applied to the payment of the debt due to the mortgagee, is absolutely void as to the attaching creditors of the mortgagor. The rule laid down in *Robinson v. Elliott*, which we follow in this case, is a healthful doctrine for any state engaged in rapidly developing its resources, and necessarily establishing its credit. It closes one of the most dangerous avenues to fraudulent practices, and, what follows, injurious effects upon the business character of the state and the honest efforts of *bona fide* business men. The judgment of the lower court is reversed and vacated, and a new trial ordered.

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Argument for Respondent.

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(March 5, 1899.)

## BARNETT v. KINNEY, SHERIFF.

[23 Pac. 922, 24 Pac. 624.]

**VOLUNTARY ASSIGNMENT—ATTACHMENT—CONFLICT OF LAW—ATTACHING CREDITOR.**—A voluntary assignment of personal property, situated in the territory, by a citizen of a sister territory, made in the latter, in trust for all his creditors and with preferences, is not good as against a nonresident attaching creditor, the law of the territory where property is situated not allowing preferences.

**COMITY BETWEEN STATES.**—A state is not bound to accept the transfer laws of another state affecting property located within its borders.

**INSOLVENCY LAWS OF IDAHO.**—In Idaho the insolvent's property must be disposed of for the benefit of all the creditors without preferences or priority, and the law makes no distinction between residents and nonresidents.

## APPEAL from District Court, Alturas County.

Angel &amp; Sullivan, for Appellant.

Before the judgment could be attacked, the findings must be set aside, because not justified by the evidence, and this could only be done on motion for a new trial. (*Reed v. Bernal*, 40 Cal. 628.) When a court draws erroneous conclusions of law from its findings of facts, it is a decision against law, for which a new trial should be granted. (*Simmons v. Hamilton*, 56 Cal. 493; *Martin v. Matfield*, 49 Cal. 42; *Knight v. Roche*, 56 Cal. 15.)

Kingsbury &amp; McGowan and C. S. Varian, for Respondent.

There being no issue of facts, the facts being all conceded, the court could commit no error as to them, nor could there be a re-examination of what was never examined or even in issue. (*People v. Mullins*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 662.) A motion for a new trial was not the proper way to inform the court as to the law, and that there can be no new trial granted where no issue of fact has been tried. (Stats., secs. 4438, 4439; 3 Estec's Pleading and Practice, sec. 4847; *Knight v. Roche*, 56

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Cal. 17; *Martin v. Matfield*, 49 Cal. 43; *Quinn v. Smith*, 49 Cal. 166.) A voluntary assignment, valid under the law of the domicile of the assignor, will convey personal property situate in another state, especially if there are no home creditors, and always if the assignee has taken possession. (*Hanford v. Paine*, 32 Vt. 442, 78 Am. Dec. 586, and note; *Speed v. May*, 17 Pa. St. 91, 55 Am. Dec. 540; *Law v. Mills* 18 Pa. St. 185; *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136, 16 N. W. 700; *Richardson v. Leavitt*, 1 La. Ann. 430, 45 Am. Dec. 90; *Johnson v. Sharp*, 31 Ohio St. 611, 27 Am. Rep. 529; *Forbes v. Scannell*, 13 Cal. 242; *Askew v. Bank*, 83 Mo. 366, 53 Am. Rep. 590; *Einer v. Beste*, 32 Mo. 240, 82 Am. Dec. 129; *Whipple v. Thayer*, 16 Pick. 25, 26 Am. Dec. 626; *Burlock v. Taylor*, 16 Pick. 335; *Daniels v. Willard*, 16 Pick. 36; *Todd v. Bucknam*, 11 Me. 41-44; *Smith v. Railroad Co.*, 23 Wis. 267; *Frazier v. Fredericks*, 24 N. J. L. 162; *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671; *Atherton v. Ives*, 20 Fed. 894; *Butler v. Wendell*, 57 Mich. 62, 58 Am. Rep. 329, 23 N. W. 460; *Farrington v. Allen*, 6 R. I. 449; *Walters v. Whitlock*, 9 Fla. 87, 76 Am. Dec. 607; *Miller v. Kernaghan*, 56 Ga. 155; *Gregg v. Sloan*, 76 Va. 497; *Sanderson v. Bradford*, 10 N. H. 260; *Atwood v. Insurance Co.*, 14 Conn. 555; *Moore v. Willett*, 35 Barb. 663; *Hoyt v. Thompson*, 19 N. Y. 207; *Ockerman v. Cross*, 54 N. Y. 29; *Wilson v. Carson*, 12 Md. 54; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 688; *Harrison v. Farmers' Bank*, 9 W. Va. 424; *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4141.)

SWEET, J.—On the twenty-third day of November, 1887, M. H. Lipman, a citizen of Utah, doing business at Salt Lake City, made an assignment to plaintiff herein in trust for all his creditors. The deed of assignment carried with it certain personal property situated in Hailey, Alturas county, Idaho territory, to wit, a stock of goods and merchandise. It is admitted that at the time the assignment was made said Lipman was insolvent; that in all respects the assignment was made in conformity with the laws of Utah territory; and that, under said deed of assignment, the creditors of said assignor were divided into classes, certain classes being designated as preferred cred-

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itors, and said assignee being instructed by said deed of assignment to observe said preferences in settling the liabilities of the assignor as fast as the sale of said merchandise enabled him to do so. On the twenty-fifth day of November, 1887, plaintiff, as said assignee, took possession of the said stock of goods situated in Hailey, in said Alturas county and Idaho territory, having first caused to be duly recorded in said county the said deed of assignment. On the following day, to wit, the twenty-sixth day of November, 1887, defendant herein, then the duly qualified and acting sheriff of said Alturas county, levied upon and took possession of said goods under and by virtue of a writ of attachment issued out of the district court of the second judicial district of Idaho territory, in and for said Alturas county, in an action wherein the St. Paul Knitting Works Company, a corporation, was plaintiff, and the said M. H. Lipman was defendant. On the twelfth day of December, 1889, plaintiff commenced an action in said court against the defendant herein for the recovery of the possession of said goods and chattels, or for the sum of \$5,000, the value thereof, in case a delivery of the same could not be had. Plaintiff obtained judgment in the lower court, took possession of said goods, and thereupon proceeded to sell the same, realizing therefrom the sum of \$4,000. Defendant appealed from said judgment, and the assignee now holds said sum of money subject to the final determination of this litigation. By a careful examination of the findings of the lower court, we find that the issues here presented are clearly and distinctly set forth. They are, in brief, to recapitulate, as follows: The assignor, at the time of making said assignment, was a nonresident of this territory. The assignment was made in strict conformity with the laws of Utah territory, of which he was a citizen. The attaching creditor was also a nonresident of Idaho, and it is conceded that said Lipman was justly indebted to said corporation in the sum of \$1,992; that at the time the writ of attachment was levied the assignee was in possession of the goods; and that the deed of assignment had been duly recorded in said county; also that the defendant was the duly qualified and acting sheriff of said Alturas county.

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The legal question involved is as follows: May a nonresident make an assignment, with preferences, of personal property situated in this territory, that will be valid as against a nonresident attaching creditor? And this question further involves the effect, first, of possession by the assignee when the attachment is levied; second, the rule of comity between the states; and, third, the effect of the attaching creditor being a resident or a nonresident of the territory. We premise a discussion of these questions with the remark that a decision by the United States supreme court is binding upon us, and that whenever any issue presented here has been clearly and distinctly settled by said court, we need look no further.

We will first take up the question of citizenship, and we submit it in this form: Will the courts of this territory concede to any of its citizens any rights or privileges under its attachment laws not extended to any citizen of the United States who is a nonresident of the territory? The attachment laws of this territory give no preferences as between resident and nonresident attaching creditors. Therefore, under the rule laid down in *Green v. Van Buskirk*, 7 Wall. 151, we must consider the matter settled. It is there held that the rights of the attaching creditor are not at all affected by the question of citizenship. In *Sheldon v. Blauvelt*, a case recently decided by the supreme court of South Carolina, reported in 29 S. C. 453, 7 S. E. 593, the same conclusion is reached. The statute of South Carolina with reference to assignments by insolvent debtors is the same, in effect, as are the provisions of our own statute, and the facts involved in the case just cited are precisely the same as those presented in the case at bar. Section 2, article 4 of the constitution reads as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." We think that the decision before alluded to in 7 Wall., in which this article is construed as affecting the rights of nonresident citizens in cases similar to this, applies to the facts as they are here presented; and under that decision, as well as under *Sheldon v. Blauvelt* and the authorities therein cited, we must conclude that the nonresidence of the attaching creditor in this case could not in any manner prejudice his rights, and that he was entitled to the same privi-

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leges that, under the same circumstances, would be accorded to any citizen of Idaho.

In reaching this conclusion we are following what we conceive to be the rule laid down by the supreme court of the United States; and the wisdom of the principle thus enunciated by our highest court is as unquestionable as its authority. When once a citizen has been accepted by any court of the United States as a suitor, it does not seem to be in accordance either with the principles of justice, or with common fairness, or with common honesty between man and man, to question him as to the particular state in which he may reside, and then give or refuse him what the court would deem to be justice if the suitor were a citizen of our own state, but deny him this supreme right if the fact is developed that he is a citizen of another state. In *Atherton v. Ives*, 20 Fed. 897, the court follows this doctrine, and concludes a vigorous indorsement of the principle in these words: "We think such a distinction should never be drawn by a court, unless compelled to do so by legislative will clearly expressed. It may be that the legislature of a state has the power to exercise such a 'patriarchal and provident sovereignty,' but this court will not assume such as the legislative will." In concluding our discussion of this principle, we will say that the pointed declaration just quoted meets with the hearty approval of this court, and in the absence of a positive statutory enactment, we do not think the court justified in asking the citizen who seeks the beneficial protection of its laws whence he came, with a view of administering the law accordingly.

The principle of comity between states, or to what extent laws governing the transfer of property in one state will be respected by a sister state, is the next question to be considered. The courts of the country have differed very much on this proposition. Nevertheless, it is conceded by all that one state is not bound to accept the transfer laws of another state affecting property located within its borders. It is useless for us to discuss the question. The rule is laid down for our guidance by the supreme court of the United States in *Green v. Van Buskirk*, 7 Wall. 151. The language of the court is as follows: "And this principle of comity always yields when the



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laws and policy of the state where the property is located has prescribed a different rule of transfer with that of the state where the owner lives." In *Atherton Co. v. Ives*, 20 Fed. 895, 896, the court also indorses this rule.

The only question remaining in this connection is, was the assignment made by Lipman, under the laws of Utah territory, contrary to a clearly expressed statute or to the settled policy of this territory? We think it was contrary to both. Commencing with section 5875, the statute designates how an insolvent debtor may proceed in this territory in proving his insolvency, and the necessary steps to be taken to complete the transfer and sale of his property for the benefit of his creditors. Under this act, an assignee, chosen by the creditors (and let us remark that these creditors may be residents or nonresidents) is appointed by the court. The assignee thus appointed must dispose of the property of the insolvent for the benefit of all the creditors, share and share alike, preferences or priority being strictly forbidden. Section 5932 is as follows: "No assignment of any insolvent debtor otherwise than as provided in this title is legal or binding on creditors." The assignment made by Lipman was in direct conflict with the provisions of this statute, and one of its most important provisions, to wit, that which prohibits preferences. It was urged by the respondent that, if this rule were applied to the case at bar, a nonresident of Idaho doing business in the territory could not make an assignment of property within the jurisdiction of the territory. This may be true, but the resident insolvent is not permitted under this law to prefer any creditor in this territory over any creditor out of the territory; and we do not think a nonresident insolvent, doing business in Idaho, ought to be permitted to make an assignment giving preferences to nonresidents of the territory over residents of the territory in which he is doing business, and the laws of which he invokes to protect his property, and maintain for him the same rights and privileges that are extended to any citizen of the territory. A nonresident, being entitled to the same right under our law as a citizen of the territory, may invoke the same principles. While this point was urged by the respondent, we think it was carried a little too far. The courts of this territory would,

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we believe, respect the assignment of a nonresident doing business in Idaho, if made in accordance with its laws. In other words, if Mr. Lipman's assignment had been made for the benefit of all his creditors, share and share alike, we believe, under the principle of comity, it would have been respected, as it would not have been contrary to the laws or the policy of this territory. In holding that this assignment was invalid as against attaching creditors, we are following the rule already quoted, and feel bound so to do; yet we do not hesitate to say that the rule meets with our approval. Persons doing business with residents of this territory should know what laws govern the transfer of property. By having one uniform principle applicable alike to all property situated in this territory, whether of residents or nonresidents, every person doing business within the territory, and every nonresident doing business with persons residing in the territory, may know, before extending credit or locating property within the jurisdiction of our laws, what laws will govern the transfer of that property, whose rights may attach and how they may attach; and it gives to our business community a stability and character that we believe to be not only desirable, but almost necessary, to free and advantageous commercial intercourse with distant states lying to the east and to the west of us.

Before passing to a consideration of the next principle involved, we add the further suggestion that sheriffs and other officers of like character in the territory have a right to understand whether or not, in proceeding under our laws, and in accordance therewith, they are protected by them. In this case the sheriff proceeded regularly and in accordance with the laws of Idaho; yet he is subjected to a suit for damages, because he did not understand and proceed in accordance with the laws of Utah, or in pursuance of transactions executed in harmony with those laws, but in direct violation of our own.

Counsel for respondent urged with a great deal of strength and persistency the fact that plaintiff was in possession of the goods at the time of the seizure by defendant under the writ of attachment. It is also averred by counsel for respondent that defendant had actual notice of the contents of the deed of assignment, and the possession thereunder by plaintiff. This

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Opinion of the Court—Beatty, C. J., Concurring.

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point was urged with a great deal of ability, and numerous authorities cited relating, perhaps indirectly, thereto. It does not seem to be a serious question. It is entirely regulated by the statute. If we do not recognize the principle of comity, for the reasons before stated, we must proceed under our own statute. This statute declares in the most positive terms that any assignment made with preferences shall not be legal or binding as against creditors. This being true, of what effect was this possession under and by virtue of an assignment that was clearly invalid? The attaching creditor was under no obligations to respect it. Indeed, the law distinctly declares that it was not valid as to him, and hence the mere fact of his possession under an invalid instrument is not material. May a person violate the positive mandates of a statute, and then claim protection as against the complainant, because the latter knew of the former's violation of the law? Nor do we see that the question of a voluntary or an involuntary assignment is entitled to consideration in passing upon the merits of the issue involved. No general assignment can be made in this territory, voluntary or otherwise, giving preferences. Therefore, we do not see that the fact of this assignment having been voluntary on the part of Lipman has any bearing whatever on this case. We must conclude, therefore, that the court below erred in holding such assignment to be valid as against attaching creditors of the assignor, and the possession of the defendant under said writ of attachment to have been unlawful. Let the judgment be reversed, and the cause remanded to the lower court, with instructions to enter judgment for the defendant in accordance herewith.

BEATTY, C. J., Concurring.—Having been of counsel between the same above-named parties in a cause, in the same lower court, but with a different attaching creditor, I desired to take no part herein further than to sit at the hearing. I have not participated with my associates in the discussion, but, they having reached opposite conclusions, the disagreeable duty rests upon me of breaking the deadlock, which, in following my convictions and what seems to me the weight of authority, I do, by concurring in the able opinion of Mr. Justice Sweet.

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Opinion of the Court—Berry, J., Dissenting.

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BERRY, J., Dissenting.—A part of the subject of the assignment in question was personal property in the territory of Idaho. The assignor lived at the time of its execution in Utah territory, where the assignment was made. It was a voluntary assignment in trust for the benefit of creditors, and is conceded to be valid under the laws of Utah territory. The assignee had gone into possession, and was in possession as such assignee, when the property was seized and taken from his possession by the sheriff of Alturas county, by virtue of a writ of attachment in favor of a creditor of the assignor, residing in the state of Minnesota, where the debt was contracted. The assignee brought replevin against the sheriff, and on the trial in the court below had judgment for the property. This appellant seeks to reverse that judgment. There is but one controlling question in the case, viz., whether that assignment, valid where it was made, should, under the statutes of this territory, be held to be operative here. Under our statute I think it is clearly valid and operative. The appellant rests upon section 5932 of the Revised Statutes of Idaho, which provides that "no assignment of any insolvent debtor other than as provided in this title is legal or binding on creditors." This is the closing section of title 12, page 677 of the statutes of Idaho. The act is headed "Proceedings in Insolvency." The general scope and apparent purpose of the whole title of fifty-eight sections is shown in its first section (5875) as follows: "Every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities." No stronger terms are needed to show that the parties thus to be favored are the citizens of Idaho; and certainly it was not designed to compel all persons contemplating assignment to reside here six months before doing so, or to compel, into our courts, citizens of other states and territories to get a discharge from their debts through insolvency proceedings. I do not believe that the revisers of our law, in 1887, had any design that Idaho should take upon her a task of that magnitude. Nor do I think there was any design to preclude parties out of this territory, who might have property in it, from making any assignment whatever for the benefit of their creditors without going through our courts in insolvency proceedings. Of course, to

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hold that this act has any extraterritorial scope and meaning is practically to deny to a nonresident the right to make any assignment whatever of his property here for the benefit of creditors. The statement of the proposition seems to me to carry with it a most forcible denial of any such intent. It is not claimed but that a state or territorial legislature may do so if it desires; but the precedents are that it will not be presumed to have so intended unless its enactments to that effect shall be clear and unequivocal. (*Butler v. Wendell*, 57 Mich. 62, 58 Am. Rep. 329, 23 N. W. 460; *Ockerman v. Cross*, 54 N. Y. 29.)

In 1860 a statute was enacted in New York entitled "An act to secure to creditors just division of the estates of debtors who convey to assignees for the benefit of creditors." Such act forbade preferences. It provided how the assignment must be executed; that an inventory should be filed of the property assigned; assignee should give bonds, etc.—all substantially as provided in our act, but with a prohibition as to other assignments as strong as our own. An assignment was made by a debtor in Canada, valid according to the laws of Canada, but in no way complying with the requirements of the New York statute. Possession in New York had been taken by the assignee, whereupon a New York creditor (not, as in this case, a foreign creditor) attached it; but the court held the act to apply to domestic assignments only, and held the foreign assignment good. (*Ockerman v. Cross*, 54 N. Y. 29.) So in *Butler v. Wendell*, 57 Mich. 62, 58 Am. Rep. 329, 23 N. W. 460. So in *Train v. Kendall*, 137 Mass. 366. So, also, in *Rice v. Courtis*, 32 Vt. 460, 78 Am. Dec. 597. But we need go, I think, no further than to the internal evidences of the act to be convinced that it was not intended to apply to foreign assignments. In fact, the title provides, expressly, that the assignor must be a resident of the territory. The judgment in the court below should be affirmed.

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Argument for Respondents.

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(March 6, 1890.)

## DRAKE ET AL. v. EARHART.

[23 Pac. 541.]

**PRIOR APPROPRIATION OF WATER—RIPARIAN RIGHTS—SALE OF WATER BY APPROPRIATOR.**—Under the law of the territory and of Congress, it has become the settled law that the prior appropriator of water has the better title thereto.

**RIPARIAN RIGHTS.**—A riparian proprietor whose claim to the use of water of a stream flowing through his land not based upon appropriation under the territorial laws is inferior to that of a prior appropriator.

**SALE OF WATER BY PRIOR APPROPRIATOR.**—Water legally appropriated may be sold by the owner for other useful purposes when it appears no more was appropriated than the owner could put to a beneficial use.

APPEAL from District Court, Alturas County.

L. Vineyard, for Appellant.

Where error is shown, the presumption is that appellant has been prejudiced by it, and it is incumbent on the respondent to see that the record discloses the fact that the appellant has not been so prejudiced. (*Norwood v. Kenfield*, 30 Cal. 393; *Jackson v. Water Co.*, 14 Cal. 18.)

F. E. Ensign and Lyttleton Price, for Respondents.

The right of a prior appropriator to water appropriated for a beneficial use is superior to that of a riparian owner of land, who became the owner after the appropriation. (*Osgood v. Water etc. Co.*, 56 Cal. 571; *Farley v. Mining etc. Co.*, 58 Cal. 142; *Himes v. Johnson*, 61 Cal. 259; *Barney v. Sabron*, 10 Nev. 217; *Luz v. Haggin* (Cal.), 4 Pac. 924; *Water Co. v. Perdew* (Cal.), 4 Pac. 426; *Judkins v. Elliott* (Cal.), 12 Pac. 116; *Kaler v. Campbell*, 13 Or. 596, 11 Pac. 301; *Ware v. Walker*, 70 Cal. 591, 12 Pac. 475; *Hill v. Lenormand* (Ariz.), 16 Pac. 266; *Clough v. Wing* (Ariz.), 17 Pac. 453; *Elles v. Improvement Co.*, 1 Wash. 572, 21 Pac. 27; *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314.) If a judgment is irregular, the proper practice is to move to correct it in the court be-

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low. (*Fox v. West*, 1 Idaho, 784; *Anderson v. Parker*, 6 Cal. 201; *Leviston v. Swan*, 33 Cal. 480.) Defects in form or explicitness in findings should be objected to in the court below. (*Parke v. Hinds*, 14 Cal. 415.) A judgment will not be reversed for any error therein which the records will enable the appellate court to fully correct. The judgment will be modified and affirmed. (*Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *Persse v. Cole*, 1 Cal. 369; *Gahan v. Neville*, 2 Cal. 81.)

BEATTY, C. J.—In the year 1879 respondent Quigley took possession of a tract of unsurveyed land at the mouth of what has since been known as “Quigley gulch,” near the town of Hailey, in Alturas county, and at the same time appropriated for the irrigation of said land the water of the stream flowing down said gulch; and the other respondents Drake and Covert, subsequently became owners in a part of said land and water. At later dates the several defendants in this action became possessed of certain lands lying upon said stream farther up the gulch, and commenced the use of the said water. To perpetually restrain them from such use, this action was commenced; and, upon the trial before the court, the right to the water was adjudged to respondents, and defendants were restrained and enjoined from using any thereof. From this judgment the appellant Earhart alone has appealed to this court.

From the findings of the court it appears that in 1879 said Quigley located the land referred to, and afterward he and said Drake, who had purchased a part, obtained patents therefor, and, so far as the findings show, still own it; that “in said year 1879, said Quigley took out of said Quigley creek, a stream flowing in said gulch, by a ditch built by him upon said land, all the waters flowing therein, and caused the same to flow upon a portion of said land”; that, “at the time of appropriation of said water as aforesaid, said Quigley posted a notice . . . claiming six hundred inches of the water of said stream”; and the court also found “that said stream carries one hundred and fifty inches of water”; that afterward said Drake and Covert succeeded to all the water, and the three respondents “continued . . . to use said water of said stream for agricultural purposes upon the land before mentioned”; that they have at all times as-

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serted title to all of said water; that none of the defendants had ever made any appropriation of any of said water in pursuance of the laws of this territory; that "irrigation is necessary to the proper cultivation of the lands of all the parties, and all the waters of said stream are required for the irrigation of the lands of plaintiffs." It appears from Earhart's answer that he purchased his land in 1885, and that it had been occupied by his grantor since May, 1883. The appellant suggests the insufficiency of the findings. While they are not explicit, if they will support the judgment, they must not be disturbed. They show the respondents together own the land and water, the latter by prior appropriation; that they use it to irrigate this land, for which all the stream is used. They do not specify under what pressure the water is measured; but, as all in the stream is required by them, and as there are but one hundred and fifty inches therein, being four hundred and fifty less than was claimed by the act of appropriation, it cannot be discovered how, in this case, the failure to specify the pressure can result in injury to the appellant.

It is also found by the court "that some time in the year 188—, before the commencement of this action, plaintiffs Drake and Quigley sold a small quantity of said water to the Oregon Short Line Railway for a water supply at its station at Hailey." From the fact that respondent so sold a portion of said water, it is argued that they had attempted the appropriation of more than they needed for a "useful or beneficial purpose." It is, unquestionably, the law that more than is required for such purpose cannot be taken; that, when legally appropriated, it may be sold for some other useful purpose; and that its use for railroad necessities is such a purpose. Did respondents sell what they did not need? It appearing that in 1879 all the water of this stream was sufficient to irrigate but a part of the land now owned by respondents, it follows that the sale of the water was not from an unneeded surplus, but from that which they had actual use for. It is their privilege to dispose of what they need, if they desire. Its sale did not damage appellant, nor could its retention by them have benefited him. How the conveyances of this land and water were made, or by what arrangements the respondents together use them, does not appear,



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and, it not appearing to have been a matter of contest below, is immaterial here. The findings support the judgment.

The important question, for the settlement of which this appeal was chiefly brought, is what, if any, rights the appellant has to any of that water as a riparian proprietor. His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows by its natural channel through his land; hence, that he is entitled to the use thereof allowed by the common law. This doctrine of riparian proprietorship in water as against prior appropriation has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky Mountains, as well as by the supreme court of the United States. But for the fact that it has elsewhere repeatedly appeared in the same court, it would seem surprising that it should now be seeking another solution in this. While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, "First in time, first in right," should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the

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supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they are approved and adopted, and next we find them undergoing the crucial test of judicial investigation. As far back as 1855, the supreme court of California, in *Irwin v. Phillips*, 5 Cal. 145, 63 Am. Dec. 113, and in *Tartar v. Mining Co.*, 5 Cal. 397, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of land through which it flowed, and, also, that in all branches of industry the prior appropriator of land, water and easements would be protected. Not only had such become the law by custom, by the legislative will and the decisions of the courts, without dissent, but the general government for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and industries were building upon this principle. To put the question beyond uncertainty, to approve and adopt what already existed as the common law of the west, the Congress, by its act of July 26, 1866, section 9, provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." It will be observed that the act is based upon the existence of local customs, laws and decisions of courts. It is not necessary that all these conditions shall exist for the protection of the right; but, as held in *Basey v. Gallagher*, 20 Wall. 684, the existence of either condition is sufficient.

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It has been said that in the case at bar no custom has been shown. It is not necessary it should be; for, prior to the beginning of appellant's claim, the superior rights of prior appropriation were acknowledged by our territorial law of 1881, and by the decisions of our courts. By a practically unbroken line of decisions the rule of the cases above referred to in 5 Cal. has been followed, and is now established by so many and such high authorities that it would seem this theme of discussion is exhausted. Brief reference, however, may be made to some of the leading cases. *Basey v. Gallagher*, 20 Wall. 681, 682, clearly indorses the superior right of prior appropriation between agricultural claimants in the following explicit language: "In the late case of *Atchison v. Peterson* [20 Wall. 507], we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that, by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance, for mining purposes, to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated, and open to general exploration, did, in natural justice, acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the courts of those states and territories, and was

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finally approved by the legislation of Congress in 1866. The views there expressed, and the rulings made, are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those states and territories, by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." In this case it is said: "The right of the first appropriator, exercised within reasonable limits, is respected"; that it "is not unrestricted. It must be exercised with reference to the general condition of the country, and the necessities of the people." This language has been seized upon as justifying the equitable, if not equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator. Such a construction is not justified, and would make the decision inconsistent with itself, as well as with the other decisions of the same court. (*Jennison v. Kirk*, 98 U. S. 461; *Broder v. Water Co.*, 101 U. S. 276.) It is evident that all the court means by this language is that the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing it, deprive his neighbor of what he has not actual use for. In *Jennison v. Kirk*, *supra*, the court says: "The owners of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation—the first in time being the first in right; but, where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed." It clearly follows, as the courts have certainly held, that when all cannot use the water without injury to the prior appropriator the other must yield to his superior right. The claim having been asserted that, when a party procured a patent for land, he would be entitled to the use of all waters flowing through the same, this was put at rest by the act of Congress of July 9, 1870, as follows: "Sec. 17. All patents granted, or pre-emption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches," etc. Since this act the rulings have been uniform that the patentee of land has no claim upon the water flowing through the same as against a prior appropriator. (*Barnes v. Sabron*, 10 Nev.

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230; *Hill v. Lenormand* (Ariz.), 16 Pac. 267, 268; *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314; *Reno etc. Reduction Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 318; *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Malad Val. Irrigation Co. v. Campbell*, ante, p. 411, 18 Pac. 52; *South Yuba etc. Min. Co. v. Rosa*, 80 Cal. 334, 22 Pac. 222.)

While there are numerous questions growing out of the water law, we have aimed to confine this discussion to that involved in this case, which is simply a contest between a prior appropriator of the water of a stream, all of which he claims, has used and needs for a useful purpose, and a party who, since such appropriation, has entered and patented some of the land through which such water, by its natural channel, flows, and who claims its use as a riparian proprietor. In accord with the authorities, as well as with our local law on this subject, it must be held that the judgment of the lower court should be affirmed; and it is so ordered.

BERRY, J., Dissenting.—This action was brought in the court below to restrain the defendants from the use of any of the waters of a stream in Quigley gulch, on the east side of Wood river, and near the city of Hailey. The plaintiffs sue jointly, as prior appropriators of the water of that stream for agricultural purposes. The defendants are occupants of lands lying above the plaintiffs' on that stream, and through which lands of the defendants the stream runs. Judgment was given for the plaintiffs, declaring them jointly to be the absolute "owners of, and entitled to the use of, all the waters flowing in Quigley gulch," without reference to its amount, or to the purposes for which it was diverted, or owned by them, or is to be used; and the defendants are, and each of them is, enjoined from diverting or using any of the waters of said stream; and for costs against the defendants, in the sum of \$270. There was no motion for a new trial, and no statement of the case made, and the case comes up upon the judgment-roll alone. It is claimed that the judgment-roll discloses errors for which the judgment should be reversed, and

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that the judgment in itself is erroneous, in declaring the plaintiffs the exclusive owners of all the waters of the stream, and restraining the defendants from any use thereof, "notwithstanding it discloses that the water flows through the lands of the defendant Earhart."

I shall attend, firstly, to the first point made—namely, that the judgment-roll discloses errors for which the judgment should be reversed. A liberal construction of the complaint may, perhaps, warrant the findings of fact made by the court, though it goes no further than that. It claims that the stream carries one hundred and fourteen inches of water. The findings of fact are as follows: "1. In the autumn of the year 1879, William G. Quigley located a piece of government land near the mouth of Quigley gulch, in the Wood River valley, in the county of Alturas and territory of Idaho. The land being then unsurveyed public domain, he was at that time unable to purchase the same from the United States, but afterward, upon the same being surveyed and coming in the market, he and the plaintiff Drake, to whom Quigley had sold a part of the lands originally claimed by him, entered the same at the United States land office at Hailey and afterward took patents therefor. In said year 1879 said Quigley took out of Quigley creek, a stream flowing in said gulch, by a ditch built by him upon said land, all the waters flowing therein, and caused the same to flow upon a portion of said land, and in the same year built a house, and continued to reside on said land from that time until the commencement of this action. At the time of appropriation of said water as aforesaid, said Quigley posted a notice at the point of diversion of said water in which he claimed six hundred inches of the water of said stream for agricultural purposes; that said stream carries one hundred and fifty inches of water. 2. Afterward, and before the commencement of this action, the plaintiff Drake succeeded to one-half of all the waters claimed and owned by said Quigley, and the plaintiff Covert succeeded to the other half thereof; and said plaintiffs, Drake and Covert, and said Quigley continued, except for the trespass and unlawful diversions of said water by the defendants hereinafter mentioned, to uninterruptedly use the waters of said stream for agricultural purposes upon

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the land before mentioned. 3. That some time in the year 188—, before the commencement of this action, plaintiffs Drake and Quigley sold a small quantity of said water to the Oregon Short Line Railway Company for a water supply at its station at Hailey. 4. At several times since the year 1881, parties not connected with this suit have, for the purpose of supplying certain brickyards situate near said stream, taken small quantities of the water thereof to supply brickyards for short periods of time, in some instances with the consent of Quigley, while he was an owner thereof, and at other times without the consent of any one of the plaintiffs. 5. The defendant occupies a several and distinct piece of land above the point of diversion by plaintiffs, and the lands owned by them, through which lands of defendants said stream flows in its natural channel. 6. That defendants, and each of them, have taken out of said stream, at various times, quantities of water in ditches constructed by them and their predecessors, and used the same for irrigating their lands, to which use the plaintiffs have objected and defendants have at all times been informed of and have known that plaintiffs asserted title to all the water flowing in said stream; and plaintiffs have many times torn out the dams constructed by defendants, and turned the water from their ditches back into the stream, and caused the water to flow down into the plaintiffs' ditches, and upon their lands. 7. None of the defendants have been in the actual adverse possession of the water of said stream, nor of any part thereof, for the period of five years next before the commencement of this suit. 8. None of the defendants at any time ever posted any notice claiming any of the waters of said stream, nor did they, or any of them, comply, or attempt to comply with any of the provisions of the act of the Idaho legislature of February 10, 1881, in relation to water rights, with a view to acquire the right to the use of any of the waters of said stream. 9. Irrigation is necessary to the proper cultivation and the raising of crops upon the lands of all the parties to this action, and all the waters of said stream are required for the irrigation of the lands of the plaintiffs."

These are all of the findings of fact. No custom as to the use of water is alleged or found, and the appellant contends

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that these facts are insufficient to sustain a judgment for the plaintiffs. He says that custom, and custom alone, where right exists to use water for irrigating purposes on the public domain, must be shown as the basis of that right; that it must be alleged and shown, and, of course, must be found. That is the law. Custom is indispensable to the plaintiffs' right. Such right is founded on custom and user. (14 U. S. Stats. at Large, p. 253, sec. 9; *Basey v. Gallagher*, 20 Wall. 683.) But nothing of the kind exists here. We might go no further, and, resting on this, the judgment is not sustained. But the counsel goes further. He insists that the respondents, and each of them, fails to show that he has, or ever had, lands to irrigate requiring six hundred inches of water, or any other amount. The court seems to have properly assumed that the right to divert water for agricultural purposes depends upon having some parcel of land to irrigate. Such is, unquestionably, the law. The decisions of the court are uniform on that point; also the statutes of Idaho (chapter 1, title 9). Covert does not seem to have had any land at any time. Quigley in 1879 is found to have occupied "a piece" somewhere at or near the mouth of the gulch, but there is no intimation as to how much—whether one acre or one hundred acres; nor is there any definite location or description of it. Water was conducted onto "a part" of this "piece"; but whether upon that part which Quigley sold to Drake, and which Drake got a patent for, or upon that which Quigley retained, does not appear. At the same time, Drake and Quigley appear to have held their lands in severalty. Drake entered his land, whatever it was, at the land office after 1879, presumably after the act of February 10, 1881; but, whenever it was, he is not shown to have been in the use of any waters at that time. After such purchase from the United States, the lands were not government domain, but any considerable appropriation of water by him must have been under the statute of Idaho. He did nothing, under that statute or otherwise, at any time, tending to constitute an appropriation by him. Neither did Covert.

In the second finding it is said that at some time not specified "Drake succeeded to 'one-half' of all the waters claimed



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and owned by Quigley, and the plaintiff Covert succeeded to the other half." By what means they "succeeded," whether by abandonment by Quigley and reappropriation by Drake and Covert, or by sale by Quigley to them, of the lands on which the water was used, or by sale of the water alone, does not appear. Presumably, if such be the fact, it should have been by lawful claim by them for irrigating agricultural lands; and no such act of appropriation was done by either. But, whether Quigley divested himself of his assumed right by abandonment or otherwise, it is certain that Quigley had nothing remaining from the time Drake and Covert succeeded, one to "one-half" and the other "to the other half," of his rights. His interest was ended. He is out of the case, and yet the judgment is in his favor. As neither Drake nor Covert are in any way shown to have had at any time any interest whatever in, or right to use, this water, or any part of it, for agricultural or for any other purpose, all of the plaintiffs are out of court; and yet the judgment is in favor of all of them jointly. It is therefore impossible, in this case, to reach what might otherwise be the principal and more important question involved in the judgment—namely, whether such a claim as the plaintiffs made to absolute ownership for agricultural purposes of the waters of a natural stream of the country, to the entire exclusion of all other settlers on the same stream, whose lands require irrigation, and to whom water is one of the necessities of life, and through whose lands that stream may run, can, under our laws, be maintained. The facts found not being sufficient to sustain the conclusions of law or judgment, it follows that the judgment as to the appellant should be reversed.

There is no room for any presumption that other prerequisites to a valid judgment existed. Indeed, it is shown affirmatively that the necessary grounds did not exist. Here, then, I think this case should end. What may be further said on the question of rights of parties diverting water upon lands for purposes of irrigation can have no binding force. There is no case before the court warranting a discussion of the subject. Such discussion may be taken as *obiter*, merely. But the majority opinion goes into it, and I may be excused for follow-

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ing its example, so far as the little time allowed me will permit.

1. The assumptions, in the majority opinion, of facts as drawn from the findings, or as properly deducible from those findings, I, for the most part, controvert. The findings of fact are hereinbefore stated in full, and they speak for themselves.

2. Nor do I admit that posting a notice on a stream, prior to 1881, claiming six hundred inches of water, was "an act of appropriation." It had nothing to do with "an act of appropriation on the public domain." That could only be done on the public domain by having lands to irrigate; *second*, by actually diverting waters upon it, by means sufficient to conduct all the water actually appropriated. There is nothing of that kind in this case, and the court is not warranted in assuming that there is.

3. The majority opinion pronounces the claim of a person whose lands lie upon a stream as resting on the "phantom of riparian rights." I deny that under the laws of this territory "riparian rights" are a "phantom," unless unlawfully and unjustly made so. The doctrine of riparian rights is a part of the common law; and the common law is the law of this territory, except as the statute steps in, and repeals or changes it. Section 18 of the Revised Statutes so declares. It provides that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts in this territory." The United States statutes have in some respects modified the common-law rule of riparian rights on the public domain where customs are shown to exist, and not otherwise. No customs are pretended here. Indeed, all customs are studiously ignored. The statutes of the territory previous to 1881 had no provision whatever on the subject of water rights. But in 1881 what are equivalent to common-law water rights were in some respects expressly affirmed, only those rights were enlarged. Section 3180 of the Revised Statutes provides that "all persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream

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are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." In the preceding chapter of the statutes it is provided that by complying with certain conditions (not one of which is pretended to be complied with in this case) a party may entitle himself to superior rights in the use of water. No one denies this fact. But it nowhere provides that anyone may entitle himself to ownership of a stream, or to entirely exclude others "on the banks or in the vicinity of a stream" from some use of the water, as provided in section 3180, above quoted. Our statute is a little more comprehensive—a little stronger, in some respects, in favor of those needing water—than the common law of riparian rights; but it leaves many of those rights intact. It is wrong, then, to designate these common-law rights as a "phantom." They are real, and the interests of our territory demand that they should be recognized.

4. By the common law, running water is not the subject of ownership. No statute of Idaho, nor of Congress, either, makes it such. By custom, when that is shown, a person in its prior use may not be disturbed in its use, providing, as Mr. Justice Field says in *Basey v. Gallagher*, 20 Wall. 683, the custom and claim under it are reasonable. But that is as far as it goes—as far as any statute of the United States or of this territory goes. Our own statutes are in accord with that view. (Idaho Rev. Stats., sec. 3188.) In *Basey v. Gallagher*, 20 Wall. 683, Mr. Justice Field says that "in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits; for this right to water, like the right by prior occupancy, to mining ground, . . . is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and to vest an absolute monopoly in a single individual."

What does this judgment do, but to violate every provision of the foregoing, severally, and as a whole? Is it reasonable to appropriate all the waters of a stream, even if it contains one thousand inches, or whatever it may be, to irrigate "a piece" of land, with no intimation of its description or amount? Is it

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reasonable to allow absolute and "unrestricted" ownership in water diverted for purposes of irrigation, only, to be used, as in this case, for sale to railroads and brickyards, or other purposes than irrigation, and still deny to others their natural, lawful, statutory rights in any of it? Where are the "reasonable limits" of such a claim? Is such a claim in accord with "the conditions of the country and necessities of the people," when those people are famishing for water, and precluded from using a drop, though an abundance runs past their doors? Does not this judgment establish "an absolute monopoly of the waters of this stream? Every one of these questions carries with it its own answer. I do not propose to pursue this argument, and show that a great majority of the cases relied on to establish this doctrine of absolute ownership and exclusive monopoly in streams do not relate to the use of water for agricultural purposes at all, but that those cases relate to diversions or use for mining purposes only. That fact may be easily shown, or else that the cases, where they relate to irrigation, are based upon mining cases. There are few of them that are not so founded, even of those cited in the majority opinion. The doctrine of those cases would prevent the settlement upon lands depending on our natural streams, and, as in the case at bar, would drive away half or more of the settlers who have already settled there. This is not for the interest of the territory, and to allow the example of this case to obtain will prove detrimental in other ways than in decreasing our population. The suffering settlers will very soon resort to the demoralizing aid of the ever present "Winchester" or revolver. People will not tolerate such unlawful claims; and the sooner they are abandoned, or reduced, within reasonable bounds, the better it will be for all. This judgment should be reversed.

Argument for Respondent.

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(March 3, 1890.)

HARVEY v. BUNKER HILL AND SULLIVAN MINING  
AND CONCENTRATING COMPANY.

[24 Pac. 30.]

**PRO FORMA JUDGMENT—APPEAL FROM.**—A complaint is filed in the justice's court alleging defendant is indebted to plaintiff in the sum of \$150. Defendant files an answer denying the indebtedness. Justice has jurisdiction only in sums of \$100. Defendant consents that judgment may be entered against him as prayed for simply to expedite an appeal. District court dismisses the appeal. Held, that the judgment must be reversed, and tried in the district court.

APPEAL from District Court, Shoshone County.

William H. Clagett, for Appellant.

The judgment rendered in the justice's court is not a judgment by default, an answer being in, and issue of fact pending. Neither was it a judgment by confession, which must be in writing, admitting some sum to be due, and concisely stating the facts out of which the debt confessed arose. (Rev. Stats., secs. 4725, 4777, 5061.) Neither is it a judgment by consent on the theory that by consenting thereto the party waives all objection to the judgment, and will not be allowed to question the same on appeal. The consent was not real, but *pro forma* only, and the party does not waive or lose any of his rights thereby. (*Mecham v. McKay*, 37 Cal. 158, 159; Hayne on New Trial and Appeal, sec. 282.) To make a good complaint in a justice's court, the facts constituting the plaintiff's cause of action must be concisely stated. (Rev. Stats., sec. 4668.)

Charles W. O'Neil, for Respondent.

No appeal lies from a judgment by consent. (*Campbell v. Randolph*, 13 Ill. 314; *Oullahan v. Morrissey*, 73 Cal. 297, 14 Pac. 864; *Brick v. Brick*, 65 Mich. 230, 31 N. W. 907, and 33 N. W. 761.) An appeal from a judgment by default can only be upon questions of law. (Hayne on New Trial and Appeal, sec. 343.) There can be no trial *de novo* where there was no

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trial originally. (*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 475.)

SWEET, J.—On March 25, 1889, plaintiff filed his complaint before J. S. Languishe, a justice of the peace in and for Wardner precinct, Shoshone county, Idaho territory, in which he alleged that the defendant was indebted to him in the sum of \$150 for professional services rendered at defendant's instance and request. On that day a summons was issued, and was returned on the 29th of the same month. On the 29th, also, defendant appeared and filed its answer, denying each and every allegation contained in plaintiff's complaint. At the same time, defendant consented to what is termed in this written consent, the entering of a *pro forma* judgment, and judgment was thereupon entered for plaintiff. The paper under which the judgment was entered is as follows:

"This case having been called for trial, the defendant consents that judgment may be entered *pro forma* in favor of plaintiff and against defendant, as prayed for in the complaint herein, reserving all of its rights under an appeal from said judgment.

"WILLIAM H. CLAGETT,  
"Attorney for Defendant."

Immediately after the rendition of judgment, to wit, on the said twenty-ninth day of March, 1889, defendant filed its notice of appeal, together with the undertaking thereon, and the said appeal was perfected by defendant's causing a transcript of the docket of said justice to be verified and forwarded to the clerk of the district court. The cause came on for trial in the district court, whereupon plaintiff moved that the appeal be dismissed. The motion was granted by the district court on the ground that, inasmuch as there had been no trial in the lower court, upon questions of fact, and that, as no statement had been made, there was nothing to try. The court, in dismissing the case, used the following language: "As before stated, the case cannot be tried in this court for the first time. There must have been an actual trial before the justice before that can be done here. Manifestly, this case can only be affirmed or reversed by

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this court, or the appeal dismissed. The appeal must be dismissed, for the reason that there are no issues presented to this court which can be tried."

We do not understand why the issues were not clearly presented in the district court. The complaint was there, alleging the debt. The answer was there, denying it. The issues were as fully presented in the district court as they could be presented after a trial had in the justice's court. No trial in the justice's court would have presented the issues any differently from the manner in which they were presented at that time. We take it that this objection is not a valid one.

The next inquiry suggested is far more serious in its character. It is this: May the defendant consent to a judgment in the justice's court, and then appeal from the judgment to which he has consented? If the amount were \$100, or less, the defendant would unquestionably be bound by the judgment to which he consented, unless a new hearing were granted in the justice's court for cause shown; and we doubt if his declaration that he consented only to a *pro forma* judgment would save him. We do not think the appeal could be saved by declining to enter into a trial before the justice involving an amount confined to the original jurisdiction of the lower court. Counsel for defendant treats his written consent to the entry of said judgment as a stipulation, and cites *Mecham v. McKay*, 37 Cal. 159, as an authority in support of his position. After stating that the court has repeatedly refused to review judgments and orders entered by consent, the court discuss the question further, and say: "We are not inclined to retract or modify this proposition. but it is to be limited to cases wherein it does not appear from the record that the consent was given only *pro forma* to facilitate the appeal, and with the understanding on both sides that the party did not thereby intend to abandon his right to be heard on the appeal in opposition to the judgment. . . . If it appears from the record that it was intended by the parties to be only a *pro forma* judgment or order entered, by consent, for the mere purpose of hastening an appeal, and with no intention to waive an exception thereto, it would be a somewhat rigid rule to give the stipulation a conclusive effect not contemplated by the parties. . . . The stipulation in this case, on which the order

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denying a new trial is entered, is not free from doubt; but, taking it altogether, and construing it as a whole, in connection with the other facts disclosed in the record, we conclude it was intended by the parties that the motion for a new trial should be denied *pro forma* only to hasten the appeal." But the plaintiff contends that this paper is in no sense a stipulation. Taken alone, it could not be considered as such. But the amount involved was and is within the original jurisdiction of the district court. Both parties were before the justice. An answer had been filed denying the indebtedness, and, on the same day, the notice of appeal was given, the undertaking filed, and the transcript promptly forwarded to the district court. Counsel for defendant contends that after said answer was filed it was agreed between counsel for plaintiff and defendant that this judgment should be entered, and that defendant should forthwith appeal the case. Counsel for defendant further insists that this agreement was reached between the parties by reason of the fact that it was then and there understood that neither party would accept the judgment of the justice's court as final, and that, no matter which way it might be decided, the appeal would follow; and that, therefore, they would save costs and trouble by simply consenting to the *pro forma* judgment (whatever that may mean), and the appeal should go forward. The counsel who represented plaintiff and respondent in this court did not appear in the justice's court, nor in the court below; hence makes no denial of all these assertions made by counsel for defendant, except that the paper in itself is not a stipulation, and that, therefore, the rule just quoted from *Mecham v. McKay*, does not apply.

Taking all the facts together, we are inclined to believe that the agreement was fairly made. The defendant was there, ready to try its case. So was the plaintiff. They agreed that the judgment rendered by the justice, no matter which way it went, would be forthwith appealed from by the losing side. There can be no question but that defendant would have tried the case then and there had not such an understanding been arrived at. As shown by the record, also, no evidence was taken by the justice, and he gave judgment for the plaintiff without requiring



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a syllable of evidence, and in the face of a denial averring that defendant was not indebted to plaintiff in any sum whatever. This simply tends to show that the justice also understood the real stipulation between the parties, and that immediately upon its consummation the judgment was entered in accordance therewith. It would, of course, be an absurdity to say that the defendant intended to consent to a *bona fide* judgment, in the face of the peculiar written consent given, and in the face of the answer, filed at the same time, denying that the plaintiff was entitled to the judgment. We do not understand that the court below entertained any such view of the case. The court below simply intimated that the case should go back for trial in the justice's court. That means simply that the parties should introduce their evidence in the justice's court, and then appeal again to the district court, where they would occupy precisely the same position in which they found themselves when they were dismissed in the first instance; for, even had evidence been introduced, they would still go to trial *de novo* in the district court on the pleadings as they now stand, and as they have stood from the beginning. As before stated, if it were not a case in which the jurisdiction of the district court were concurrent with the jurisdiction of the justice's court an appeal of the kind would not be allowed, for the reason that, unless the amount exceed \$100, the intention of the statute is that the higher court shall not be burdened with the consideration of the case until, after a trial, the party appeals as prescribed by law.

Defendant cites *Brick v. Brick*, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761. The language of the court in that case is as follows: "It appears from the printed record that the decree below was entered, by the consent of defendant, by his solicitor. Such a decree is binding upon the parties, unless impeached for fraud or mistake, and no such claim is advanced on this appeal." The facts already stated show most conclusively that, to say the least, if the consent entered in the justice's court resulted in a judgment from which no appeal could be legally had, a mistake was made. This view urged by the defendant is not seriously denied. Counsel for respondent cites *Campbell v. Randolph*, Idaho, Vol. 2—49

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13 Ill. 314. The Illinois statute provides that "appeals from judgments of justices of the peace to the circuit court shall be granted in all cases except on judgments confessed." (Rev. Stats., 1845, c. 59, sec. 58.) The entry in the case discussed was as follows: "This day being set for trial, and the parties appeared, and the defendant filed his setoff. But, no proof being before the court, and the defendant by his counsel admitting the plaintiff's account, judgment is, therefore, rendered in favor of the plaintiff and against the defendant for the sum of \$17.20, principal and interest, and cost of suit." The court held this not to be a judgment by confession. Under our statute a judgment by confession may be made, but section 5061 contains the following requirements: "It must be made, signed by the defendant, and verified by his oath, to the following effect: 1. It must authorize the entry of judgment for a specified sum; 2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due or to become due; 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same." It is unnecessary to say that the judgment in this case was not, under this statute, a judgment by confession; nor was it a judgment by default, because the defendant was in court with an answer denying the allegations contained in the complaint. We think there can be no question of the agreement between the parties as to what should be done in the premises; nor do we think it possible for the judgment to stand, having been rendered, without evidence, notwithstanding defendant's answer denying the averment set forth in the complaint. (*Curtis v. Superior Court*, 63 Cal. 435.)

We will not pass this case without expressing our disapproval of proceeding in this manner; for it, at best, encumbers the practice with proceedings of a doubtful character, and throws into the court many perplexing questions involving both time and expense. The judgment is reversed, and a trial ordered in the district court.

Beatty, C. J., and Berry, J., concur.

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## ABATEMENT OF ACTION.

See Parties, 2.

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## ACCOUNT.

1. ACTION ON ACCOUNT.—In an action for a balance of account on a general account for labor done, money paid and goods sold it is not necessary to set forth in the complaint the amount of each separate item. (Mills v. Glennon, 105.)
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### APPEAL AND ERROR.

#### *Appellate Practice, Generally.*

1. **APPEAL—CONTINUANCE OF CASE—CHANGE OF COURT.**—An appeal is not the commencement of a new action or proceeding, but a continuation of the same case, action or proceeding, being only transferred from one court or tribunal or body to another, for final trial and judgment. (*Van Camp v. Board of Commrs.*, etc., 29.)
2. **STATUTORY APPEAL.**—The right to appeal is statutory, and unknown to the common law; it cannot be extended to cases not within the statute. (*General Custer Min. Co. v. Van Camp*, 40.)
3. **APPEAL—STATUTORY RIGHT.**—The right to appeal, and the manner of perfecting it, is wholly dependent upon our territorial statutes. (*Rupert v. Board of Commrs. of Alturas Co.*, 19.)
4. **WRIT OF ERROR—PARTIES ARE PRIVIES.**—No one can sue out and maintain a writ of error unless he is a party or privy to the record, or is prejudiced by the judgment. (*Van Camp v. Board of Commrs.*, etc., 29.)
5. **APPEAL—INSUFFICIENT RECORD—AFFIRMANCE.**—Where the complaint will support the judgment, appellant must show error or judgment will be affirmed. (*Murphy v. Fuld*, 175.)

#### *What Appealable.*

See Divorce, 2; Elections, 10; Nonsuit, 1.

6. **FINAL DECISION—MOTION FOR NEW TRIAL—ORDER DENYING APPEALABLE.**—The organic act of the territory does not prohibit the legislative assembly from authorizing an appeal from an order of the district court, overruling a motion for a new trial. (*Schultz v. Keeler*, 333.)
7. **APPEALABLE ORDERS.**—An appeal will not lie from a judgment of the district court, in common-law actions or proceedings, unless it is expressly allowed by statute. (*Van Camp v. Board of Commrs.*, etc., 29.)
8. **NONAPPEALABLE ORDERS.**—The right of appeal given by statute from orders of the board of commissioners does not imply the right of appeal from orders of the board of equalization. (*General Custer Min. Co. v. Van Camp*, 40.)

#### *What Reviewable.*

9. **REVERSIBLE ERROR—PARTIES.**—On appeal, this court can only notice the errors committed against the appellant, not those committed against the successful party. (*Jones v. St. John Irr. Co.*, 58.)
10. **PLEADING—PRACTICE—OBJECTION CANNOT BE RAISED IN SUPREME COURT FOR FIRST TIME.**—If an action is tried upon the theory

**APPEAL AND ERROR (Continued).**

that the answer denies the allegations of the complaint, the objection that certain allegations in the complaint are admitted through defective denials cannot be raised for the first time in the appellate court. (*Toulouse v. Burkett*, 288.)

11. **ADMISSIBILITY NOT RAISED IN APPELLATE COURT FOR FIRST TIME.**—Objection to the admissibility of evidence cannot be made for the first time in the appellate court. (*Darby v. Heagerty*, 282.)
12. **OBJECTIONS TO ANSWER IN THE SUPREME COURT.**—An objection that an answer does not contain facts sufficient to constitute a defense may be made in the supreme court for the first time. (*Caldwell v. Ruddy*, 1.)
13. **SAME.**—If, however, the answer contains any defense, the objections must be overruled. (*Caldwell v. Ruddy*, 1.)
14. **DEMURRER—RENEWING ON APPEAL.**—Where a general demurrer is interposed in the trial court questioning the sufficiency of the complaint and the demurrer is overruled, and the ruling is not saved by bill of exceptions, such question is deemed adjudicated and the same objection to the complaint cannot be renewed in the supreme court. (*Guthrie v. Fisher*, 111.)
15. **APPEAL—FINDINGS—REVIEW ON APPEAL.**—On appeal a finding of fact will not be reviewed unless the evidence upon the trial in reference thereto is fully and clearly reported in the record. (*Riborado v. Quang Pang Min. Co.*, 144.)
16. **CRIMINAL LAW—APPEAL—REVIEWING EVIDENCE.**—On an appeal from the judgment only, the court cannot inquire whether the verdict is supported by the evidence; this can be done only upon an appeal from the order denying a new trial. (*People v. Pier-son*, 76.)
17. **FINDINGS NOT SUPPORTED BY EVIDENCE—REVIEWED BY APPELLATE COURT WHEN.**—Errors in findings of fact on the ground that they are not supported by the evidence can only be reviewed in the appellate court on an appeal from an order overruling a motion for new trial. (*Toulouse et al. v. Burkett*, 184.)
18. **EXCEPTIONS TO RULINGS OF COURT—WHEN TO BE CONSIDERED ON APPEAL.**—Exceptions to the ruling of the court upon the admission and rejection of the evidence may, when properly incorporated into a statement of the case, having been used upon the hearing of a motion for a new trial, be considered on an appeal from a judgment in the same manner as when brought up by a bill of exceptions. (*Bradbury v. Idaho etc. Land Imp. Co.*, 239.)
19. **REVIEW OF CRIMINAL CASES.**—Upon appeal in criminal cases the review in this court is confined to questions of law. The guilt of defendant is a matter for the jury upon legal evidence. (*United States v. Camp*, 231.)

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**APPEAL AND ERROR (Continued).***Record and Judgment-roll.*

20. **STATEMENT OF CASE—RECORD ON APPEAL.**—A paper inserted in the record denominated a statement, and which does not appear to have been settled and signed by the trial judge, is not part of the judgment-roll, and cannot be considered in this court on appeal. (*Crews v. Baird*, 103.)
21. **RECORD ON APPEAL FROM JUDGMENT.**—On appeal from a judgment, without a statement, nothing belongs to the record, except the judgment-roll, and no question arising outside the roll can be considered. (*Guthrie v. Phelan*, 95.)
22. **APPEAL—JUDGMENT-ROLL—BILL OF EXCEPTIONS.**—On appeal from a judgment without a statement or bill of exceptions, nothing belongs to the record except the judgment-roll, and no question arising outside the roll can be considered. The mode of presenting questions not arising on the judgment-roll for review on appeal is by statement or bill of exceptions. (*Jones v. St. John Irr. Co.*, 58.)
23. **RECORD ON APPEAL—JUDGMENT-ROLL—TRANSCRIPT—STIPULATION.**—Upon appeal from a judgment upon the judgment-roll alone a written stipulation signed by both parties stipulating for judgment in behalf of plaintiff in a certain sum is properly no part of the judgment-roll, and would, on motion, be stricken out, yet where such stipulation is in the record without objection, and is referred to by both parties in argument upon hearing the appeal, it will be considered by the court as a part of the transcript by consent of parties. (*Grete v. Knott*, 13.)

*Materiality of Error.*

24. **PREJUDICIAL ERROR.**—All errors which do not prejudice the party in his substantial rights must be disregarded; that he was prejudiced in any of his substantial rights will not be presumed when not shown. (*Territory v. Neilson*, 614.)
25. **IRRELEVANT EVIDENCE—NOT GROUND FOR REVERSAL—WHEN.**—Irrelevant evidence is not sufficient ground for the reversal of a judgment when it does not prejudice the cause of the party excepting to it. (*Bradbury v. Idaho etc. Land Imp. Co.*, 239.)
26. **PRACTICE—OFFER OF EVIDENCE.**—An offer or oral proof being made and rejected and exceptions duly taken, the appellate court must be satisfied from the record that the offered evidence was material or tended to support some issue involved before it will be treated as error. (*United States v. Alexander*, 386.)

*Presumptions.*

27. **PRESUMPTIONS.**—Presumptions are in favor of the decision of the court, and where a reversal of a judgment is sought on the

**APPEAL AND ERROR (Continued).**

- ground of error, the ruling of the court will be sustained unless sufficient facts appear in the record to show that error was committed. (*Territory v. Evans*, 425.)
28. When there are both issues of law and fact and the cause is brought on for trial and a judgment rendered, the presumption will be indulged on appeal that the issue of law was previously disposed of by an order overruling the demurrer. (*Guthrie v. Phelan*, 95.)
29. **ERROR NOT SHOWN—PRESUMPTION IN FAVOR OF TRIAL COURT.**—If the record on appeal does not affirmatively show error in the court below, the judgment will be affirmed, as every intendment is in favor of the irregularity of the trial court. (*Toulouse v. Burkett*, 288.)
30. **INCOMPLETE RECORD—PRESUMPTIONS.**—Where a refusal to give instructions requested by a party is assigned as error, this court will look into the entire charge to determine whether such refusal was prejudicial, and where the record shows that a charge was given which is not brought here for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict. (*Hopkins v. Utah Northern Ry. Co.*, 300.)
31. **PRACTICE—PRESUMPTION—SUFFICIENCY OF INDICTMENT.**—On appeal from a judgment in a criminal case, where no part of the evidence is brought to the supreme court by bill of exceptions, or otherwise, and the indictment is sufficient to support the judgment, this court will assume that the evidence was sufficient to warrant the verdict, and will further assume that the trial court's charge to the jury was pertinent to the facts proved on the trial. (*People v. Woods*, 364; *People v. Williams*, 366.)
33. **APPEAL—RECORD ON APPEAL—PRESUMPTIONS—INSTRUCTIONS.**—Upon an appeal from a judgment of conviction in a criminal case, in the absence of the evidence, the instructions will be presumed correct, if, under any possible state of the evidence, the instruction was authorized. (*People v. Mooney*, 17.)
- Reversal and Remand.*
34. **DISTURBING FINDINGS—IRRELEVANT FINDING.**—If the findings of fact sustained the conclusions of law, the judgment below will not be disturbed on appeal simply for the reason that some of the findings of fact and the conclusions of law are irrelevant. (*Riborado v. Quang Pang Min. Co.*, 144.)
35. **TESTIMONY—INSUFFICIENCY OF.**—A judgment will not be reversed when there is a substantial conflict in the testimony, or unless it seems the result of passion or prejudice. (*Chamberlain v. Woodin*, 642.)

**APPEAL AND ERROR (Continued).**

36. **IMPLIED BIAS—SETTING ASIDE VERDICT.**—The court will not disturb the finding of a trial judge upon the question of implied bias, unless it is so clear a case as would warrant a judge in setting aside the verdict of the jury as against the evidence. (*United States v. Langford*, 561.)
37. **JUDGMENT—VOID SENTENCE—CORRECTION.**—Where the indictment is good and no error appearing on the trial, but the sentence is void for uncertainty, the appellate court may remand the case to the court below, with directions to enter a proper judgment upon the verdict. (*Territory v. Guthrie*, 432.)

***Dismissal of Appeal.***

38. **PRACTICE—APPEAL—DISMISSAL.**—In an action where relief is granted both parties, on motion to dismiss the appeal under rule 3 of the supreme court, the certificate of the clerk below, under rule 4, not showing the nature and substance of the judgment appealed from, held, that said certificate will not justify dismissal of the appeal. (*Dunniway v. Lawson*, 632.)
39. **SHOWING FOR DISMISSAL.**—The court will not dismiss an appeal under rule 3 unless it be made to appear that justice requires such dismissal. (*Dunniway v. Lawson*, 632.)
40. **RULES DIRECTORY.**—Rule 3 is directory, and gives no right to a party to demand its enforcement. (*Dunniway v. Lawson*, 632.)

***Notice of Appeal.***

41. **APPEAL—NOTICE—ADVERSE PARTY.**—One of two defendants appeared generally in the action, the other specially, and moved to quash summons, after which joint judgment was rendered against both of them, and the one who appeared specially appealed. *Held*, that the other defendant was an adverse party to the appeal, and should be served with notice thereof. (*Jones v. Quantrell*, 153.)
42. **SAME—DISMISSAL OF APPEAL.**—An appeal will be dismissed on motion where all the adverse parties are not served with notice of appeal. (*Jones v. Quantrell*, 153.)
43. **PRACTICE—SERVICE OF PAPERS—STATUTORY CONSTRUCTION.**—Section 685 of our Code of Civil Procedure which provides that service of papers may be made by leaving the same in the office of an attorney in a conspicuous place, etc., is in derogation of the common law, and must be strictly construed. (*Warner v. Teachenor*, 38.)
44. **SERVING NOTICE OF APPEAL.**—If a party to an action dies after the rendition of judgment and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney before substitution will not bind the representatives of the deceased or any other party in interest. (*Coffin v. Edginton*, 627.)



**APPEAL AND ERROR (Continued).**

45. **SAME.**—Any party to an action, whether plaintiff or defendant, may appeal, but the notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or interveners, (*Coffin v. Edington*, 627.)
46. **PROOF OF SERVICE.**—An affidavit in proof of such service must state that all the conditions of the statute authorizing such service have been substantially complied with or it will be disregarded. (*Warner v. Teachenor*, 38.)

**Bonds and Undertakings.**

See Justices of Peace, 5.

47. **UNDERTAKING ON APPEAL—WHEN THERE ARE TWO APPEALS AND THE UNDERTAKING FAILS TO SPECIFY VOID FOR UNCERTAINTY.**—An undertaking on appeal under section 4809 of the Idaho code, intended to apply to several appeals in the same action, must specify each of such appeals, and will not be construed to apply to appeals not mentioned therein. (*Sebree v. Smith*, 357.)
48. **PRACTICE—VOID UNDERTAKING ON APPEAL.**—When an appeal is taken from the judgment, also from an order refusing a new trial in the same case, and an undertaking given in the sum of three hundred dollars in such an appeal, the bond is void and the appeals should be dismissed. (*Motherwell v. Taylor*, 148.)
49. **SAME—PRESENTING NEW BOND ON APPEAL.**—When an undertaking on an appeal is void, the filing of a new and sufficient undertaking at the hearing of motion to dismiss the appeal will not avail the appellant. (*Motherwell v. Taylor*, 148.)
50. **APPEAL BOND—VOID FOR UNCERTAINTY.**—When two appeals are taken, one from the judgment and the other from an order denying a new trial, and an undertaking is given "on such appeal," the bond is void for uncertainty, and the appeals will be dismissed, because no undertaking was filed in either appeal. (*Eddy v. Van Ness*, 101.)

See Criminal Law, 10; Divorce, 3; Elections, 7, 8; Exceptions, Bill of; Indictment, 1; Justices of Peace; New Trial; Parties 2; Pleading and Practice, 10; Transcripts.

**APPEARANCE.**

**VOLUNTARY APPEARANCE—WAIVER.**—Voluntary appearance of attorney and participation in the argument of a motion waives notice of such motion. (*Curtis v. Walling*, 416.)

**ATTACHMENT.**

1. **WRIT OF ATTACHMENT—DAY IN COURT—JUDGMENT.**—When a debt claimed to be due by one person to another is attached as

**ATTACHMENT (Continued).**

provided for by section 4309 of the Revised Statutes, and such person has been examined under section 4310 of the Revised Statutes, and the existence of liability denied, the court or judge has no power to order a judgment against such alleged debtor upon such examination. (*Lindenthal v. Burke*, 571.)

2. **PROPERTY HELD UNDER WRIT OF ATTACHMENT—EXECUTION ON JUDGMENT—TO WHOM SHOULD ISSUE.**—The officer who seized goods under a writ of attachment, and holds the same, is the proper officer to whom the execution on the judgment in the attachment suit should issue. (*Pecotte v. Oliver*, 251.)
3. **SAME—ISSUED TO WRONG OFFICER—EXECUTION AMENDABLE.**—Where a constable attached and held goods, and the execution was directed to the sheriff, but delivered to the constable, who served the same, *held*, the execution not void but amendable. (*Pecotte v. Oliver*, 251.)
4. **SURETIES—UNDERTAKING FOR RELEASE OF ATTACHMENT.**—Sureties on an undertaking given for the release of attached property cannot go behind the judgment to set any matter of defense to their liability which might have been pleaded in the original action. (*Guthrie v. Fisher*, 111.)

See Sheriffs and Constables.

**ATTORNEY AND CLIENT.**

**ORAL STIPULATIONS OF ATTORNEYS—COURT WILL NOT CONSIDER UNLESS IN OPEN COURT.**—The court will not attempt to determine the nature or effect of disputed oral stipulations of litigants or attorneys affecting the rights of parties or the conduct of the trial, and it will not enforce such stipulations unless the attorneys agree in open court as to what they are, nor will they be considered on appeal, unless they are made a part of the record. (*Sebree v. Smith*, 359.)

See Appeal and Error, 43-46; Appearance; District Attorneys; Exceptions, Bill of, 13; New Trial, 1; Witnesses, 5.

**ATTORNEY'S FEE.**

See Mortgages, 3.

**BIGAMY.**

**INDICTMENT—BIGAMY—COHABIT.**—In an indictment under section 3 of the act of Congress, approved March 22, 1882, chapter 47, entitled "An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy and for other purposes," the use of the word "cohabit" is sufficient, and it is not necessary to set out at large in the indictment the meaning or definition of the word itself. In the trial of a cause arising

**BIGAMY (Continued).**

under said section the prosecuting attorney referred to the fact that the defendant had failed to testify as a witness in his own behalf when he had the right to do so. This is held error, but is cured by the court subsequently, at the request of the defendant, charging the jury in substance that the fact that the defendant did not testify in his own behalf should not in any manner be considered by the jury as a circumstance against him. (United States v. Kuntze, 480; United States v. Cozzens, 486.)

**BILLS AND NOTES.**

1. **ACTION ON PROMISSORY NOTE—MORTGAGE TO SECURE NOTE.—SURETY—AGREEMENT.**—One Leland and appellant Williams made their joint and several promissory note payable to the order of one Shaw, and delivered the same to him, Williams being a surety, although that did not appear on the face of the note. As an inducement to Williams to sign the note Leland agreed and did execute a first mortgage on real estate to secure the note. Shaw, after the note and mortgage became due, assigned both to one Vollmer, who assigned them to the respondent bank. The respondent now claims the mortgage invalid, as it was not sealed; held, that by statute in force at time of giving the mortgage a seal was not necessary, hence, the mortgage was valid, and an action should have been brought to foreclose the same, and not upon the note alone, as was done, as the security was not valueless. (First Nat. Bank of Lewiston v. Williams, 670.)
2. **PROMISSORY NOTE—AGREEMENT TO CANCEL—PAROL EVIDENCE.**—D. purchased mining property, deeded one-sixth interest to B. B. executed and delivered to D. his note due one year after date for \$4,308.80, his share of the purchase price. At the same time D. orally agreed that at any time before maturity of the note he would accept from B. a reconveyance of his interest and cancel the note. In a suit for the collection of the note B. set up the oral agreement as a defense; held, that as such oral agreement tended to establish a contract different in form, purpose and effect from the written contract, and not based on want of consideration, fraud or mistake, the said oral agreement was inadmissible as evidence to vary the terms of the note or defeat it. (Dulaney v. Burke, 179.)
3. **DEFENSE—INADEQUACY OF CONSIDERATION.**—Inadequacy of consideration is no defense to an action on a promissory note unless there was fraud also on the part of the promisee. (Caldwell v. Ruddy, 1.)
4. **SURETY—COMPETENCY OF PRINCIPAL.**—A surety to a promissory note is deemed to contract that the principal maker is in every way competent to contract in the way he has done. (Caldwell v. Ruddy, 1.)

**BILL OF EXCEPTIONS.**

See Exceptions, Bill of.

**BOARD OF COMMISSIONERS.**

See Appeal and Error, 8; County, 2; Elections, 8.

**BOARD OF EQUALIZATION.**

See Appeal and Error, 8; Counties, 2.

**BONDS.**

See Principal and Surety.

**BOUNDARIES.**

See Indian Lands.

**BROKERS.**

1. **SALE—AGENCY—FIXED PRICE.**—If A and B own a mine and authorize C to sell it for them, or bring them a purchaser at a fixed price, with the understanding that C is to have all he can get above that price, C may make the best bargain he can with anyone; he may purchase it himself, and is under no obligation to disclose to A and B anything he may have discovered concerning the mine after such arrangement is made. (*Synnott v. Shaughnessy*, 122.)
2. **AGENCY—COMMISSION FROM BOTH PARTIES.**—If an agent act openly and with the consent of both owners and purchaser, he may contract for and receive a commission from both. (*Synnott v. Shaughnessy*, 122.)
3. **COMMISSIONS OF BROKER.**—Where a party employs a real estate broker to sell a piece of real property at a stipulated price, at an agreed commission, and the broker finds a purchaser and introduces him to his employer, and afterward the employer sells the property to said purchaser at a less price and refuses to pay the broker his commission, held, the broker is entitled to his commission of ten per cent. (*Smith v. Anderson*, 537.)

**BURGLARY.**

1. **BURGLARY—STATUTORY CONSTRUCTION.**—In section 59, Crimes and Punishments, Revised Laws, page 332, wherein it provides that "every person who shall in the night . . . break and enter in a dwelling-house or tent with intent to commit murder, robbery, mayhem, larceny or other felony," the term "larceny" applies alike to grand and petit larcenies. (*People v. Stapleton*, 47.)

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**BURGLARY (Continued).**

- 2. INDICTMENT—VALUE OF PROPERTY.**—In an indictment for burglary drawn under the statute it is not necessary to allege the value of the property intended to have been stolen. (*People v. Stapleton*, 47.)

**CHALLENGES.**

See *Jury*.

**CHAMBERS, TRIAL AT.**

See *Officers*, 3.

**CHATTEL MORTGAGES.**

- 1. VOID SALE—MORTGAGED CHATTELS—EVIDENCE—ORAL CONSENT TO SALE.**—Under the statutes of Idaho making the willful sale of property upon which there is a chattel mortgage, without the written consent of the mortgagee, larceny, and declaring the sale void, evidence of an oral consent of the mortgagee to the sale of such property is admissible in evidence to explain the intention of the mortgagor in making such sale. (*Mills v. Glennon*, 105.)
- 2. CHATTEL MORTGAGE—ATTACHING CREDITORS.**—Under the laws of Idaho a mortgagor may retain the possession of the mortgaged chattels as against attaching creditors by recording the mortgage as provided by statute. (*Lewiston Nat. Bank v. Martin*, 734.)
- 3. ATTACHING CREDITORS' RIGHTS.**—Possession of a stock of merchandise by the mortgagor, with power to sell and retail the same, without requiring the proceeds to be applied to the payment of the debt due the mortgagee, is void as to attaching creditors of the mortgagor. (*Lewiston Nat. Bank v. Martin*, 734.)

See *Replevin*, 5.

**CITIZENSHIP.**

See *Mines and Minerals*, 17-22.

**CLAIM AND DELIVERY.**

See *Replevin*.

**COLLATERAL SECURITY.**

See *Pledge*.

**COMITY.**

- COMITY BETWEEN STATES.**—A state is not bound to accept the transfer laws of another state affecting property located within its borders. (*Barnett v. Kinney*, 740.)

**COMMERCE.**

**CONSTITUTIONAL LAW—SHIPPING DAMS, NETS, SEINES, FISH-TRAPS, ETC., OUT OF THE TERRITORY—COMMERCE BETWEEN STATES.**—Section 7193 of the Revised Statutes of Idaho, prohibiting the exportation of fish from this territory, being in conflict with section 8, article 1, of the constitution of the United States, providing for the regulation of commerce between the states, is void. (*Territory v. Evans*, 658; *Territory v. Nelson*, 651.)

**COMMISSIONERS.**

See Board of Commissioners.

**COMMISSIONS.**

See Brokers.

**COMPLAINT.**

See Pleading and Practice.

**COMPROMISE.**

See Evidence, 1.

**CONFLICT OF LAWS.**

See Comity; Insolvency; Judgments, 7; Usury.

**CONFRONTING WITH WITNESS.**

See Criminal Law, 5.

**CONSTABLES.**

See Sheriffs and Constables.

**CONSTITUTIONAL LAW.**

1. **CONSTITUTIONALITY OF ACT—DUE PROCESS OF LAW.**—An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when under the general law of the land no one else is so liable under such circumstances, does not provide the "due process of law" provided for in the constitution of the United States, and is therefore void. (*Catril v. Union Pac. Ry. Co.*, 576.)
2. **POWER TO LEGISLATE IN THE TERRITORIES.**—The legislative power of the territory extends to all "rightful subjects of legislation," subject to the limitations placed thereon by the constitution of the United States. (*Taylor v. Stevenson*, 180.)

**CONSTITUTIONAL LAW (Continued).**

3. **ACT IN CONFLICT WITH ORGANIC ACT—APPOINTMENT OF OFFICER BY GOVERNOR.**—An act of the legislative assembly of the territory which devests the governor of the power confided to him by Congress to appoint certain territorial officers is in conflict with the letter and spirit of the organic act, and therefore void. (*Taylor v. Stevenson et al.*, 180.)
4. **OFFICERS AND ATTACHES OF LEGISLATIVE ASSEMBLY—LIMITATION AS TO NUMBER.**—The number of officers and attachés of territorial legislative assembly is determined by the laws of the United States, and cannot be increased by any act of the legislative assembly itself. (*Stevenson v. Moody*, 260.)
5. **EXPENSES OF LEGISLATIVE ASSEMBLY—CANNOT PAY ATTACHES NOT AUTHORIZED.**—A territorial legislative assembly is limited in its expenses to the amount provided by Congress, and cannot appropriate money from the territorial treasury to pay attachés not authorized by the act of Congress. (*Stevenson v. Moody*, 260.)  
 • See Commerce; Criminal Law, 5; Elections; Officers.

**CONTINUANCE.**

**CONTINUANCE—AFFIDAVIT—ADMISSION.**—Where, in a criminal action, the defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that the witnesses, if present, would testify to the facts as stated in the affidavit, and that such evidence, if proper, be considered as actually given, the affidavit thereby becomes evidence, but not conclusive of its contents, and it is not error for the court after such admission to deny the continuance. (*Territory v. Guthrie*, 432.)

**CONTRACTS.**

1. **CONTRACT—CONSTRUCTION—INTENTION OF PARTIES—EVIDENCE.**—The intention of the parties is to be ascertained—1. From the instruments themselves; 2. From parol testimony, and, when ascertained, will be carried out by the courts. (*Winters v. Swift*, 61.)
2. **TIME ESSENCE OF CONTRACT.**—While time is not necessarily of the essence of the contract in equity, yet it may be made so by the parties. (*Settle v. Winters*, 215.)
3. **SAME—AS TO MINING PROPERTY.**—Where the character of the property is such that it is liable to sudden fluctuation of value, time is of the essence of the contract. This rule is especially applicable to mining property. (*Settle v. Winters*, 215.)

See Insane Persons.

**CONVERSION.**

See Trover and Conversion.

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CORPORATIONS.

1. **ULTRA VIRES—CORPORATE POWERS.**—A corporation, as a general rule, can only exercise such powers as are specifically granted by the act of incorporation, or such as are necessary for the exercise of such powers, all other acts being *ultra vires*. (Salmon River Min. Co. v. Dunn, 26.)
2. **SAME.**—A corporation whose charter authorizes it to engage in the business of mining and smelting is not authorized to purchase choses in action, as such act is not necessary to the business of mining and smelting. (Salmon River Min. etc. Co. v. Dunn, 26.)

See Constitutional Law, 1.

## COUNTERCLAIM.

See Setoff and Counterclaim.

## COUNTIES.

1. **PARTIES TO ACTION—COUNTY MUST BE SUED IN CORPORATE NAME.**—An action by a county must be in its corporate name. Since the 1st of June, 1887, the date when the Revised Statutes of Idaho went into effect, an action for the benefit of a county, and where the demand sued upon is a property of the county, must be in the corporate name of the county. (United States ex rel. McDonald v. Shoup, 493.)
2. **BOARD OF EQUALIZATION—POWERS DISTINCT FROM COMMISSIONERS.** The board of county commissioners and the board of equalization, although composed of the same persons, are separate and distinct bodies, with different duties and powers. (General Custer Min. Co. v. Van Camp, 40.)

See Appeal and Error, 8.

## COUNTY COMMISSIONERS.

See Board of Commissioners.

## COURTS.

1. **TIME AND PLACE OF HOLDING COURT—POWER OF JUDGES TO FIX.**—The judges of the district court have power when assembled at the capital to fix the time and places for holding court in their respective district. (United States v. Kuntze, 480; United States v. Cozzens, 486.)
2. **SAME—WHERE UNITED STATES IS A PARTY.**—They also have the power to fix the time and places for holding terms of court for the trial of causes where the United States is a party, or where such cause arises under the constitution and laws of the United States. (United States v. Kuntze, 480; United States v. Cozzens, 486.)



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COURTS (Continued).

3. **VENIRE—JURORS—MARSHAL.**—In such cases it is proper to issue the venire to the marshal of the United States, directing him to summon jurors from the body of the district at large. (*United States v. Kuntze*, 480; *United States v. Cozzens*, 486.)
4. **DECISION OF APPELLATE COURT—LAW OF CASE.**—The decision of the appellate court upon any matter properly before it on the records becomes the law of the case in all subsequent proceedings therein. (*Palmer et al. v. Utah and Northern Ry. Co.*, 382.)

See Judges; Justice of Peace.

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CRIMINAL LAW.

1. **INDICTMENT—ACCESSARY.**—By our statutes all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, are treated as principals, and should be prosecuted and punished as such, yet if one who is in fact an accessory before the fact is indicted as such, this is not a defense of which the accused will be heard to complain. (*Territory v. Guthrie*, 432.)
2. **CRIMINAL ORGANIZATION.**—Orders, organizations, associations, or by whatever name called, which teach, advise, counsel, encourage, or practice the commission of crimes forbidden by law, are criminal organizations. (*Wooley v. Watkins*, 590.)
3. **OVERT ACTS OF MEMBERS.**—To become and continue to be members of such organizations are such overt acts of recognition and participation as make them *particeps criminis*, and as guilty in contemplation of law as though they actively engaged in promoting their unlawful objects and purposes. (*Wooley v. Watkins*, 590.)
4. **REASONABLE DOUBT.**—A reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life. The above definition of the term, while not perhaps the best that can be given, has been substantially approved by the courts and is not error. (*People v. Dewey*, 83.)
5. **DEPOSITIONS IN CRIMINAL CASES.**—Depositions taken in the presence of the accused may be used on trial, when on account of death or other good cause, the presence of the witness cannot be had; our statutes do not forbid such use, nor is it in violation of sixth amendment to the constitution of the United States. (*Territory v. Evans*, 651.)
6. **FACTS AS TO GUILT—GENERAL REPUTE OF GUILT.**—It is not proper for the court to allow evidence of the general repute of the defendant in the neighborhood in which he lives in order to establish—  
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**CRIMINAL LAW (Continued).**

lish that guilt. The facts themselves must be shown, and it is for the jury to draw inferences. (*United States v. Langford*, 561.)

7. **IMPROPER INSTRUCTIONS.**—Nor is it proper for the court to charge the jury that if the defendant has by his acts induced others to believe, or the public to believe, that the defendant has cohabited with more than one woman, that his acts are unlawful. (*United States v. Langford*, 561.)
8. **CRIMINAL PRACTICE.**—When the evidence in a criminal trial is not sufficient to sustain a conviction, the remedy by defendant is by motion asking the court to instruct the jury to find a verdict of not guilty. A motion to nonsuit is not proper in criminal practice. (*People v. Barnes*, 161.)
9. **TESTIMONY—WAIVER.**—Where a defendant introduces testimony after a motion to instruct the jury to return a verdict of not guilty is denied, he waives his right to assign as error the order denying such motion. (*Territory v. Neilson*, 614.)

See Continuance; Instructions, 10-15; Jury.

**CROSS-EXAMINATION.**

See Witnesses, 4.

**CUSTOMS.**

See Mines and Minerals, 23, 24.

**DAMAGES.**

See Replevin.

**DEATH OF PARTY.**

See Parties, 2.

**DEEDS.**

See Mortgages, 1.

**DE FACTO OFFICERS.**

See Officers.

**DEMURRER.**

See Pleading and Practice.

**DEPOSITIONS.**

**DEPOSITION—PRESUMPTION IN FAVOR OF OFFICE TAKING.**—In determining the admissibility of a deposition taken under the provisions

**DEPOSITIONS (Continued).**

of our Code of Civil Procedure, the presumption is that the commissioner discharged his duty by doing all that the statute requires, except as to matters which he must return specifically as done. (Darby v. Heagerty, 282.)

See Criminal Law, 5.

**DETINUE.**

**PLEADING—ACTION OF DETINUE.**—The complainant in an action of detinue which alleges the wrongful taking of the property in question, the detention, the demand, and damages for wrongful withholding the same, is sufficient. (Crewe v. Baird, 103.)

**DISORDERLY HOUSES.**

**HOUSES OF PROSTITUTION—MISDEMEANOR.**—To establish the fact that a house is kept for the purpose of prostitution, evidence of its general reputation as such is competent. (Territory v. Bowen, 640.)

**DISTRICT ATTORNEYS.**

**ASSISTANT COUNSEL IN CRIMINAL CAUSES.**—Counsel may be employed to assist the district attorney in the trial of criminal causes, and the statute recognizes his right to appear and take part in the conduct of the case. (People v. Biles, 114.)

**DIVORCE.**

1. **DIVORCE—ALIMONY.**—The allowance of alimony to the wife and counsel fees pending an action of divorce rests in the sound discretion of the trial court. (Wyatt v. Wyatt, 236.)
2. **ALIMONY—ORDER NOT APPEALABLE.**—Under the laws of this territory no appeal lies to the supreme court from an order in an action of divorce, for the payment of alimony *pendente lite*, and counsel fees. The parties must abide by the discretion of the court in this regard until a final judgment is rendered in the action. (Wyatt v. Wyatt, 236.)
3. **RESTRAINING ORDER DURING SUIT FOR DIVORCE.**—In an action for divorce a restraining order to save the property pending the litigation may be reviewed on an appeal to this court. (Wyatt v. Wyatt, 236.)

**DUE PROCESS OF LAW.**

See Constitutional Law, 1.

**ELECTIONS.**

1. **ELECTIONS.**—When so irregular and fraudulent that the true result cannot be ascertained from the returns of the poll,

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ELECTIONS (Continued).

- they should be rejected and the true result shown by other evidence. (*Chamberlain v. Woodin*, 642.)
2. **ELECTION OATH — REGISTRAR CAN ADMINISTER.** — Under the election law, sections 504 and 505 of the Revised Statutes, power is conferred upon the registrar to administer the election oath. (*Territory v. Anderson*, 573.)
4. **ACT OF CONGRESS — QUALIFICATIONS OF ELECTORS.** — The act of Congress of March 22, 1882, touching the qualifications of electors in the territories, does not repeal sections 1851 and 1860 of the organic acts, which give the territorial legislature power to prescribe the qualifications of electors of the territory. (*Wooley v. Watkins*, 590.)
5. **TERRITORIAL STATUTE NOT REPUGNANT TO CONSTITUTION OF UNITED STATES.** — The territorial statute of February 3, 1885, which prescribes the qualifications of voters of the territory and provides that those qualifications may be ascertained by the oath of the electors, is not repugnant to the constitution of the United States. (*Innis v. Bolton*, 442, affirmed.) (*Wooley v. Watkins*, 590.)
6. **ORGANIZATION OF TERRITORY — POWER CONFERRED.** — The organic act confers concurrent power upon the territorial assembly of Idaho, to prescribe the qualifications and disabilities of voters of the territory, and to provide a mode by which those qualifications may be ascertained. (*Wooley v. Watkins*, 590.)
7. **SAME — WRIT OF ERROR.** — In such case the remedy is not by appeal but by writ of error; and, aided by bills of exceptions, writs of error furnish a complete and perfect means of bringing causes from an inferior court to the appellate court for review, and for the correction of errors. (*Rupert v. Board of Commrs. of Alturas Co.*, 19.)
8. **APPEALABLE JUDGMENT — ORDER OF BOARD OF COUNTY COMMISSIONERS.** — No appeal will lie from the judgment of the district court upon an appeal to the district court from an order made by the board of county commissioners determining the result of an election. (*Rupert v. Board of Commrs. of Alturas Co.*, 19.)
9. **SUFFRAGE — AUTHORITY OF LEGISLATURE.** — The legislative assembly of the territory, having authority concurrent with Congress, may legislate upon the subject of suffrage, observing, of course, the constitutional limitations, and also the restrictions imposed by Congress. (*Innis v. Bolton*, 442; *Hayward v. Bolton*, 452.)
10. **TEST OATH — ACT CONSTITUTIONAL.** — The act of the legislative assembly of the territory of Idaho, passed at its thirteenth session, creating additional disqualifications for voting, and prescribing a test oath as a mode of ascertaining the qualifications of persons offering to vote, is not in violation of the constitution of the United States. (*Innis v. Bolton*, 442; *Hayward v. Bolton*, 452.)

**ELECTIONS (Continued).**

11. **SUFFRAGE AS A RIGHT — MAY BE ABRIDGED OR WITHDRAWN.**—The right of suffrage is not a natural right, nor an unqualified personal right, but in a territory is a right conferred by law, which may be abridged or withdrawn by the authorities that conferred it, subject to constitutional limitations and restrictions. (*Innis v. Bolton*, 442; *Hayward v. Bolton*, 452.)

**EMBEZZLEMENT.**

**EVIDENCE.**—Evidence of the pecuniary condition of defendant charged with embezzlement immediately prior to the time and during the time the offense is alleged to have been committed is competent. (*United States v. Camp*, 231.)

**EMINENT DOMAIN.**

See Railroads, 1, 2.

**EQUITY.**

**PRACTICE—SUBMISSION OF ISSUES IN EQUITY.**—In equity it is within the discretion of the court to submit both legal and equitable issues to the jury at the same time. (*Houser v. Austin*, 204.)

See Landlord and Tenant.

**ESTATES OF DECEDENTS.**

See Executors and Administrators.

**EVIDENCE.**

1. **EVIDENCE.**—Offers of settlement of a suit not accepted are not admissible against the party making them on the trial of the action. (*Sebree v. Smith*, 359.)
2. **SECONDARY EVIDENCE—TRANSCRIPT OF LOST ACCOUNT-BOOK.**—True and correct transcripts or original account-books with *aliunde* as to the items thereof may be admitted in evidence when the original books have been accidentally destroyed by fire. (*Mills v. Glennon*, 105.)
3. **RES GESTAE—DECLARATIONS OF DECEASED.**—Declarations of deceased, made half or three-quarters of an hour after an affray (in which deceased was fatally shot) and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest, and when deceased had been for that length of time among his friends, are inadmissible as part of the *res gestae*. (*People v. Dewey*, 83.)

See Appeal and Error; Bills and Notes, 2; Depositions; Mines and Mining, 23, 24; Witnesses.

## EXCEPTIONS, BILL OF.

1. **EXCEPTIONS, BILL OF, WILL BE TREATED AS STATEMENT.**—A bill of exceptions settled and signed by the trial judge will be treated as such, although it is denominated a statement. (*Schultz v. Keeler*, 333.)
2. **EXCEPTIONS—STATEMENT.**—A bill of exceptions settled and signed by the trial judge will be treated as such, although it is called a statement on motion for a new trial. (*United States v. Alexander*, 386.)
3. **EXCEPTIONS—STIPULATION EXTENDING TIME—WAIVER.**—When exceptions to evidence are taken during the trial, but such exceptions are not settled until two months after the trial, and more than a month after filing decision the appellant then having prepared a case embodying a bill of exceptions, in which bill the exceptions taken during the trial are included, and the case containing such bills allowed, and settled without objection in the presence of the attorneys for the respective parties, *held*, that such exceptions are not waived; *held*, also, that by the failure to object at the settlement the party is deemed to have agreed to the extension of time under section 2426 of the Revised Statutes of Idaho. (*Lockhart v. Rollins*, 540.)
4. **EXCEPTIONS DEEMED TO HAVE BEEN TAKEN.**—The exceptions which, by section 403 of the Practice Act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions, and cannot be considered, on appeal, without being incorporated into a bill of exceptions and made a part of the judgment-roll. (*Guthrie v. Phelan*, 95.)
5. **BILL OF EXCEPTIONS—EX PARTE MOTION TO STRIKE.**—A bill of exceptions may not be stricken out of the transcript upon appeal upon the ground that the same was not served upon the adverse party prior to settlement. (*Jones v. St. John Irr. Co.*, 74.)
6. **PRESUMPTIONS.**—The presumption is that the district court acted regularly in settling a bill of exceptions. (*Jones v. St. John Irr. Co.*, 74.)
7. **OVERCOMING PRESUMPTIONS—EVIDENCE—MOTION TO STRIKE.**—To overcome the presumption of regularity in the action of the trial court in settling a bill of exceptions by showing that the bill was settled without having been served upon the adverse party, proof of the failure of such service must be made, upon due notice to the adverse party. (*Jones v. St. John Irr. Co.*, 74.)
8. **EXCEPTIONS TAKEN AT THE TRIAL.**—Exceptions taken at the trial and settled as provided in sections 405 and 406 of the Civil Practice Act form part of the judgment-roll, and constitute part of the record on appeal from the judgment. (*Guthrie v. Phelan*, 95.)

**EXCEPTIONS, BILL OF (Continued).**

9. **CHARGES GIVEN BY THE COURT.**—If the defendant desires to have the charges given by the court of its own motion reviewed by the appellate court, he must except thereto at the time such charges are given and incorporate the same into a bill of exceptions certified to by the judge. (*People v. Biles*, 114.)
10. **BILL OF EXCEPTIONS—PRACTICE—APPEAL—REVIEW.**—An exception to the order of the court sustaining a motion for judgment on the pleadings must be made a part of the record on appeal by bill of exceptions settled under section 406 of the Code of Civil Procedure before it will be reviewed on appeal. (*Purdum v. Taylor*, 167.)
11. **EXCEPTION TO ORDER SUSTAINING DEMURRER.**—An exception deemed to have been taken to the order sustaining a demurrer should have been settled in a bill of exceptions and brought to this court. When it is not done the court will not consider it. (*Berry v. Alturas County*, 296.)
12. **EXCEPTIONS—SETTLEMENT OF, BY JUDGE AFTER TRIAL.**—An agreement of parties to an action on trial, appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial. (*Sebree v. Smith*, 359.)
13. **SERVICE OF NOTICE—ATTORNEYS.**—The affidavit of one attorney to the effect that a bill of exceptions was not served upon the respondent prior to its settlement is not sufficient in a case where the respondent was represented by two attorneys, as in such case the affiant can actually know only of such failure of service upon himself, and can only entertain a belief as to service upon his co-counsel. (*Jones v. St. John Irr. Co.*, 74.)

**EXECUTION.**

See Attachment; Homesteads, 3; Sheriffs and Constables.

**EXECUTORS AND ADMINISTRATORS.**

1. **ADMINISTRATOR—PRESENTMENT OF CLAIM TO—REVIVAL OF ACTION AGAINST PERSONAL REPRESENTATIVE.**—Under section 140, page 267, Revised Laws of Idaho, which provides that, "if any action be pending against the testator or intestate at the time of his death, the plaintiff shall . . . present his claim to the executor or administrator for allowance or rejection, authenticated, as in other cases, and no recovery shall be had in the action unless proof be made of the presentation required by the law," an action by the United States which has been revived against the decedent's administrator without presentation of plaintiff's claim as required by statute will be dismissed, as such statute applies to the United States. (*United States v. Hailey*, 23.)

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**EXECUTORS AND ADMINISTRATORS (Continued).**

2. **PLEADINGS—CLAIM AGAINST ESTATE.**—In actions against an estate it is not necessary to allege in the complaint that the "claim" sought to be collected has been presented to the administrator for his allowance. (*Toulouse et al. v. Burkett*, 184.)
3. **EQUITABLE RELIEF—PROBATE PRACTICE.**—In cases purely equitable, and in which purely equitable relief is sought, the cause of action set out in the complaint does not constitute a "claim" which must be presented to the administrator before an action can be maintained under section 138 of our Probate Practice Act. (*Toulouse v. Burkett*, 184.)

**EXEMPTIONS.**

See Homesteads.

**FEEES.**

See Judges; Officers.

**FELLOW-SERVANTS.**

See Railroads, 3.

**FILING.**

See Transcripts.

**FINDINGS.**

1. **FINDINGS—JUDGMENT.**—Where the findings are responsive to all the material issues raised by the pleadings, and they support the judgment, judgment will be affirmed. (*McGuire v. Lamb*, 378.)
2. **PLEADINGS—FINDINGS—JUDGMENT.**—Where the findings are responsive to all the material issues raised by the pleadings, and are warranted by the testimony, and they support the judgment and no errors at law appearing, the judgment will be affirmed. (*Cooper v. Kellogg*, 330.)
3. **FINDINGS OF COURT—CONCLUSIVE.**—The findings of the court should be responsive to the allegations in the pleading and a finding upon such allegation is conclusive as to each item of evidence offered to sustain it. (*Broadbent v. Brumback*, 366.)
4. **FINDINGS THAT DON'T FIND.**—Where the findings of fact are not responsive to the material issues, and are so uncertain that they would not warrant a judgment thereon, the case should be reversed. (*Bowman v. Ayers*, 305.)
5. **FINDINGS — CONCLUSIONS OF LAW—IF NOT RESPONSIVE TO ISSUES WILL NOT SUPPORT JUDGMENT.**—By this appeal two questions are presented for consideration here: 1. Are the findings of fact re-



**FINDINGS (Continued).**

sponsive to the issues? 2. Are the conclusions of law supported by the findings of fact? Findings of fact must be responsive to all the material issues raised by the pleadings. Conclusions of law based upon findings of fact outside the issues raised by the pleadings cannot be sustained, and will not support a judgment. (*Carson v. Thews*, 176.)

6. **CONCLUSIONS OF LAW — AMENDING — FINDING OF FACTS.**—It is not error for the court to amend its conclusions of law after they are filed and before entering judgment, or to vacate an order directing judgment to be entered for a certain amount, and thereafter render judgment for a different amount when the findings of fact warrant it. (*Curtis v. Walling*, 416.)

See Appeal and Error; Fraud; Referee's Findings; Trial.

**FISH.**

See Commerce.

**FORECLOSURE.**

See Mortgages.

**FOREIGNERS.**

See Mines and Minerals, 17-22.

**FRAUD.**

1. **PRACTICE—FINDINGS OF COURT.**—If in an action of fraud the findings of the court are sufficient to sustain the judgment, the fact that the court fails to find upon certain allegations in the complaint which, if found true or not true, would not affect the result, is no cause for a new trial. (*Tage v. Alberts*, 271.)
2. **SAME.**—In such actions findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues, and not objectionable as being outside thereof. (*Tage v. Alberts*, 271.)

**FRAUDS, STATUTE OF.**

See Vendor and Vendee.

**GRANTS TO RAILWAYS.**

See Public Lands, 4, 5.

**HEAD OF FAMILY.**

See Homesteads, 2.

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**HOMESTEADS.**

1. **HOMESTEAD—EXEMPTION.**—Under the homestead laws of this territory, page 627 of our Revised Laws, edition of 1874-75, the widow may select a homestead after the death of her husband under section 1 of said act, and have the same set apart, but the probate court, for the benefit of herself and children, under section 4 of said act. (*Coughanour v. Hoffman's Estate*, 290.)
2. **WIDOW HEAD OF FAMILY UNDER HOMESTEAD ACT.**—The widow is the head of a family in contemplation of the first section of said act, and the benefits of the act are secured to her as a wife surviving her husband by section 4 of said act. (*Coughanour v. Hoffman's Estate*, 290.)
3. **JUDGMENT LIEN ON HOMESTEAD—EXECUTION.**—A judgment lien acquired before the filing of a declaration of homestead by respondent and wife subjects such property to sale under execution. Such lien cannot be devested by any subsequent act of the owners. (*Smith v. Richards*, 498.)

**HOMICIDE.**

1. **HOMICIDE UNDER STATUTE—DEGREE OF CRIME—INSTRUCTIONS.**—Upon a trial for murder an instruction to the effect that the defendant is guilty of murder in the first degree if the jury believe from the evidence, beyond a reasonable doubt, that the deceased was killed by defendant while defendant was attempting to commit a robbery, is correct under a statute which makes such offense murder in the first degree. (*People v. Mooney*, 17.)
2. **HOMICIDE—STATUTORY DEFINITION OF MURDER.**—The statutory definition of murder of the first degree is a distinct and substantive definition, and excludes therefrom certain homicides which would be murder at common law. (*People v. O'Callaghan*, 156.)
3. **INEXCUSABLE HOMICIDE—PURSUING DECEASED.**—When the deceased was slain while endeavoring to escape from the defendant, and had succeeded in wholly withdrawing in good faith from the vicinity of the defendant and his house, and all danger to the person of defendant, to his habitation, or anyone residing therein was over, then the killing can neither be justified, excused or mitigated by declarations of defendants, made to another person shortly before the homicide, and evidence thereof was properly refused. (*People v. Pierson*, 76.)
4. **HOMICIDE—EVIDENCE.**—In case of a homicide committed by the defendant where the fatal shot was fired while the deceased was retreating and after all danger from him was over, and while defendant was pursuing him, then the defendant is guilty of murder or manslaughter, as the case may be. (*People v. Pierson*, 76.)

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**HOMICIDE (Continued).**

5. **HOMICIDE—DEFENSE OF WIFE—EVIDENCE OF REPUTATION.**—When the defendant seeks to justify a homicide on the ground that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be the wife of the defendant, and that she kept a house of prostitution, with a view of showing that the deceased was upon the premises for purposes other than felonious, is proper. (*People v. Pierson*, 76.)
6. **INSTRUCTIONS—MOTIVE.**—An instruction that if the jury believe from the evidence beyond a reasonable doubt that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder, is proper. (*People v. Pierson*, 76.)
7. **INSTRUCTIONS—MALICE—MURDER.**—An instruction that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart" is not objectionable under a statute which provides that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (*People v. McDonald*, 10.)
8. **SAME—IF GIVEN FOR MURDER IN FIRST DEGREE, WILL SUSTAIN VERDICT FOR SECOND DEGREE.**—An instruction to the jury, upon which defendant is convicted of murder in the second degree, though objectionable as defining murder in the first degree, is sufficient to sustain the verdict as found. (*Territory v. Evans*, 425.)
9. **INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**—There was an absence of circumstantial evidence at the trial—the evidence being that of eye-witnesses to the homicide; defendant asked the following instruction: "If the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances be themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive of the defendant for committing the offense charged." *Held*, that such instruction was properly refused. (*People v. Ah Too*, 44.)
10. **MODIFIED VERDICT—PRESUMPTION ON APPEAL.**—Where the indictment sufficiently charges murder in the second degree, and the verdict is "guilty of murder of the first degree as charged," and there is no claim that the verdict is not supported by the evidence, and no other error appearing, the supreme court may treat such verdict as a verdict for murder in the second degree and modify the judgment of the court below accordingly. (*People v. O'Callaghan*, 156.)

**HOMICIDE (Continued).**

11. **INDICTMENT—LANGUAGE OF STATUTE.**—An indictment for murder in the first degree must be substantially in the language of the statute defining that degree of the offense. (*People v. O'Callaghan*, 156.)
12. **COMMON LAW.**—An indictment for murder which would be sufficient at common law is not necessarily so for murder of the first degree under the statute. (*People v. O'Callaghan*, 156.)
13. **CRIMINAL PLEADINGS—PRACTICE.**—The indictment for murder need not name the degree, but must show by a statement of facts substantially in the language of the statute the highest grade of the offense for which the party charged is to be tried, and then a conviction may be had for any lower degree included therein. (*People v. O'Callaghan*, 156.)

**HOUSE OF PROSTITUTION.**

See Disorderly Houses.

**IMPROVEMENTS.**

See Public Lands, 1.

**INCEST.**

**INCEST.**—The crime of incest may be committed by one party to the act without the consenting mind of the other party thereto. (*People v. Barnes*, 161.)

**INDIAN LANDS.**

1. **TERRITORIAL LIMITS—TREATIES WITH INDIANS.**—None of the lands embraced within the boundaries of Idaho territory are excepted out of said territory by the provisions of section 1 of the organic act, except such as, by the provisions of pre-existing treaties with Indian tribes, were not, without the consent of such Indian tribes, to be included within the limits of any state or territory. (*Utah etc. Ry. Co. v. Fisher*, 53.)
2. **SAME.**—At the time of the passage of the organic act of Idaho territory no treaty existed between the United States and any Indian tribe providing that the lands embraced within the Fort Hall Indian reservation should not, without the consent of such tribe, be included within any state or territory; such lands, therefore, became part of Idaho territory upon the passage of such organic act, March 3, 1863, and have not since been withdrawn from or excepted out of said territory. (*Utah etc. Ry. Co. v. Fisher*, 53.)

See Taxation, 4.

## INDICTMENTS.

1. **INDICTMENT—SUFFICIENCY OF—QUESTIONING ON APPEAL.**—The indictment must support the judgment, and this question may be raised for the first time in the supreme court. (*People v. O'Callaghan*, 136.)
2. **INDICTMENT FOR MURDER, IF IT SUFFICIENTLY DESCRIBES CRIME, WILL BE SUSTAINED.**—In determining the offense charged in an indictment, all parts of the instrument will be considered together, and if from the whole it appears that a crime is sufficiently alleged, it will be sustained. (*Territory v. Evans*, 425.)
3. **INDICTMENT—DIFFERENT COUNTS.**—Under our practice, the indictment must charge but one offense, but the same offense may be set forth in different forms and under different counts. *Held*, that the indictment charging one defendant as principal and the other as an accessory before the fact charges but one offense. (*Territory v. Guthrie*, 432.)
4. **MOTION AND ARREST OF JUDGMENT—OBJECTIONS TO INDICTMENT.**—Objection to an indictment "that it does not substantially conform to sections 233 and 234 of the Criminal Practice Act" cannot be taken advantage of upon a motion in arrest of judgment, under section 426. Such objections, if made at all, must be made by demurrer under section 285 as limited by section 293. (*People v. Stapleton*, 47.)

See Bigamy; Burglary, 2; Homicide, 11-13; Perjury.

## INJUNCTIONS.

1. **INJUNCTION—WHAT MUST BE SHOWN TO OBTAIN.**—Where a party seeks relief by interlocutory injunction, he should show some clear, legal or equitable right, and an apprehension of immediate injury to those rights. Where none such are shown, the injunction will be denied. (*McGinnis v. Freidman*, 393.)
2. **INJUNCTION—DISCRETION OF COURT.**—The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same where there is no abuse of discretion. (*Washington and Idaho Ry. Co. v. Coeur d'Alene Ry. etc. Co.*, 439.)
3. **MINE OWNERS' RIGHTS—EQUITY—POWER OF COURT—INJUNCTION—NONJOINDER OF PARTIES.**—Nonjoinder of parties plaintiff is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury. (*Gilpin v. Sierra Nevada etc. Min. Co.*, 696.)
4. **WHEN PARTY ENTITLED TO INJUNCTION.**—Where a party makes a *prima facie* case that he is in possession of a claim, and his surface location shows a vein the apex of which is within the lines

**INJUNCTIONS (Continued).**

of the claim, and carries valuable ore, he is entitled to an injunction restraining other parties owning contiguous claims from extracting ore from a vein within his lines until the matter can be determined on its merits. (*Gilpin v. Sierra Nevada etc. Min. Co.*, 696.)

5. **CLAIM OWNER'S RIGHTS—IRREPARABLE INJURY—WASTE.**—Where a party alleges that acts are being committed and threatened to be continued in violation of his rights, which will cause waste, great or irreparable injury, he is entitled to a writ restraining the commission of such acts, particularly where the subject matter of the litigation is a mine, and the act complained of is the removal of the ore therefrom, by underground workings, which would render the mine worthless. (*Gilpin v. Sierra Nevada etc. Min. Co.*, 696.)

6. **TO PREVENT CRIME.**—Courts of equity will not interfere by injunction to prevent the commission of a crime where no property rights are invaded. (*McGinnis v. Freidman*, 393.)

See Divorce, 3; Landlord and Tenant.

**INSANE PERSONS.**

1. **VOIDABLE CONTRACT—INSANE PERSON—PERSONAL PRIVILEGES.**—The contract of an insane person is merely voidable, not absolutely void. The right to avoid it is a personal right which can only be exercised by the insane person, or his guardian, or legal representatives. Other parties to the contract who are of sound mind are not affected until it is avoided by the party entitled to disaffirm it. (*Caldwell v. Ruddy*, 1.)
2. **AVOIDING CONTRACT—RETURN OF CONSIDERATION.**—The insane person may not disaffirm his contract without returning the consideration. (*Caldwell v. Ruddy*, 1.)

**INSOLVENCY.**

1. **VOLUNTARY ASSIGNMENT—ATTACHMENT—CONFLICT OF LAW—ATTACHING CREDITOR.**—A voluntary assignment of personal property, situated in the territory, by a citizen of a sister territory, made in the latter, in trust for all his creditors and with preferences, is not good as against a nonresident attaching creditor, the law of the territory where property is situated not allowing preferences. (*Barnett v. Kinney*, 740.)
2. **INSOLVENCY LAWS OF IDAHO.**—In Idaho the insolvent's property must be disposed of for the benefit of all the creditors without preferences or priority, and the law makes no distinction between residents and nonresidents. (*Barnett v. Kinney*, 740.)

## INSTRUCTIONS.

*In General.*

1. **INSTRUCTIONS.**—In charging a jury the court should give only such instructions as are pertinent to the evidence. (*People v. Ah Too*, 44.)
2. **ABSTRACT PROPOSITIONS.**—Instructions giving abstract propositions of law, but which have no application to the facts proven, should be given. (*People v. Ah Too*, 44.)
3. **INSTRUCTIONS TO JURY.**—The charge to the jury should be brief, explicit and comprehensive—full enough to protect the rights of the parties, and not so prolix as to confuse. It is not error to refuse to give an instruction which has once been given in substantially the same language. (*United States v. Camp*, 231.)
4. **PRACTICE—INSTRUCTION TO JURY.**—When a court instructs a jury upon what state of facts they must find a verdict for either party, the instructions should include all the facts in the controversy material to the rights of the parties. (*Johnson v. Fraser*, 404.)
5. **SAME—INSTRUCTIONS PROPERLY REFUSED.**—Instructions asked are properly refused when they are not based upon some evidence material to the controversy, although as abstract principles of law they are correct. (*Johnson v. Fraser*, 404.)
6. **SAME.**—It is not necessary to give an instruction in the exact language of the statute, and it would be erroneous, in some cases, to do so; it is sufficient if the substance is correctly given. (*People v. McDonald*, 10.)
7. **INSTRUCTIONS—VERDICT.**—When the instructions, taken as a whole, fairly submit the case to the jury, the verdict will not be disturbed on account of mere inaccuracies in some of the instructions given. (*Lufkins v. Collins*, 256.)
8. **OMISSION OF THE COURT TO CHARGE.**—If either party desires the court to give other or further instructions, he must prepare the same and present them to the court for approval or rejection. (*People v. Biles*, 114.)
9. **EXCEPTIONS.**—Where the court gives a general charge to the jury, and the charge contains various propositions of law and a general exception only is taken, *held*, that the exception is not sufficient. (*Black v. City of Lewiston*, 276.)

*In Criminal Cases.*

10. **INSTRUCTIONS REQUESTED.**—In criminal prosecutions, as in other actions, instructions to the jury must be based upon some evidence in the case. If they do not, when requested, they should be refused. (*Territory v. Evans*, 425.)

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**INSTRUCTIONS (Continued).**

11. **REVIEWING INSTRUCTION—WHOLE CHARGE TO JURY WILL BE CONSIDERED.**—In reviewing alleged errors on appeal from a judgment in a criminal case, where objection is made to specific instructions, the entire charge will be considered together, and if it fairly and correctly presents the law bearing upon the issues tried, the appellate court will not disturb the judgment. (*Territory v. Evans*, 425.)
12. **INSTRUCTIONS TO QUIT—ADVISE JURY.**—At the close of the testimony for the prosecution the defendant moved the court to instruct the jury to acquit, which motion the court denied. Held, that such an instruction would have taken the facts from the jury, which the court cannot do, as it can only advise the jury. (*Territory v. Neilson*, 614.)
13. **CRIMINAL PRACTICE—INSTRUCTIONS.**—Under the Criminal Practice Act the trial court, in charging the jury, may state the evidence and declare the law. (*People v. Bernard*, 193.)
14. **SAME.**—The entire charge on a particular point must be considered in determining whether or not it is misleading. (*People v. Bernard*, 193.)
15. **SAME.**—The instructions herein examined and held not prejudicial to the defendant. (*People v. Bernard*, 193.)  
See Appeal and Error; Homicide; Witnesses, 2.

**INTEREST.**

See Usury.

**INTERSTATE COMMERCE.**

See Commerce.

**IRRIGATION.**

See Waters and Watercourses.

**JOURNALS OF LEGISLATURE.**

See Mandamus.

**JUDGES.**

- SALARY AND FEES OF PROBATE JUDGE.**—The law under which the plaintiff in error claims salary and fees, and upon which his claim is based, was repealed before the services were performed. (*Hart v. Boise County*, 376.)

See Courts; Justices of Peace.



## JUDGMENT.

1. ENTRY OF JUDGMENT IN VACATION.—Under our Civil Practice Act a judgment or order of the district court may be entered in vacation. (*Schenk v. Birdseye*, 141.)
2. JUDGMENT—PROBATE COURT DOCKET.—Entries in the docket of the probate court that complaint was filed, summons issued and served, demurrer to complaint filed, and the entry of fees for overruling demurrer and entering default, with the following entries: "To entering final judgment, \$1.00; certified copy for roll, \$1.50; docketing judgment, 50 cents; making judgment-roll, 50 cents; sheriff's fees, \$5.00; damages, \$310.00"—do not constitute a judgment for either party, and an appeal from such a judgment to the district court will not lie. (*Grey v. Cederholm*, 34.)
3. VOID ENTRY NUNC PRO TUNC.—Under a statute requiring the entry of a judgment by an inferior court at the close of the trial an entry *nunc pro tunc* of such judgment in an inferior court made long after the trial, and after an appeal to the district court had been taken, is unauthorized. (*Grey v. Cederholm*, 34.)
4. JUDGMENT ON STIPULATION—PRACTICE.—Where a defendant stipulates that judgment may be entered for plaintiff for a sum greater than that demanded in the complaint a judgment for such sum is proper. (*Grete v. Knott*, 13.)
5. SATISFACTION OF JUDGMENT.—A judgment lien is a vested right of property, and cannot be satisfied except by payment or release. (*Smith v. Richards*, 498.)
6. PRACTICE—NEW TRIAL—MODIFY JUDGMENT.—The judge of the district court may, upon motion for a new trial on the ground of insufficient evidence to sustain the verdict, modify the judgment by striking out the name of one of the parties defendants where several defendants are severally joined. (*Gaffney v. Hoyt*, 199.)
7. ACTION ON FOREIGN JUDGMENT—SUFFICIENCY OF COMPLAINT.—A complaint in a suit upon a foreign judgment which alleges that the defendant had been personally served by summons in the city in which the foreign court is held, that he appeared in the action by counsel, that thereafter judgment was newly given, and that the court rendering the judgment was a court of record, which, under the laws of New York had jurisdiction of the subject matter of the action, is sufficient. (*Schenk v. Birdseye*, 141.)

See Appeal and Error, 34-37; Findings; Homesteads, 2.

## JUDGMENT-ROLL.

See Appeal and Error, 20-23.

## JURY.

1. JURORS—QUALIFICATIONS OF.—A juror must have all the qualifications now prescribed for an elector, and a member of the so-called Mormon church cannot be a juror. (*Territory v. Evans*, 651.)
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## JURY (Continued).

2. **SAME—CHALLENGE IN CRIMINAL CASES—EXCEPTIONS.**—No exception is by statute allowed to an order overruling a challenge to a juror for general cause; hence, such order is not error. (*Territory v. Evans*, 651.)
3. **CHALLENGE—JURORS—DISCRETION.**—Great latitude of discretion is allowed to the court in the trial of challenges for cause, and where on an examination for cause a juror states in substance that he has an opinion in favor of the defendants, but in spite of that opinion he could act upon the evidence and law of the case, and the juror was rejected, this court will not interfere with the discretion of the trial court, even though the members of this court should believe from the record that the juror so excluded was competent. (*United States v. Alexander*, 386.)
4. **NUMBER OF PEREMPTORY CHALLENGES.**—The legislature did not intend where in an action there are several parties on either side, that each individual should have four peremptory challenges, but that they should join and have one set on either side. (*United States v. Alexander*, 386.)
5. **CHALLENGES FOR CAUSE—EXAMINATION.**—Where the record shows that a party was precluded from examining a juror for cause, and no examination of the juror was had, *held*, that a substantial right of the party was denied for which a new trial will be granted. (*United States v. Alexander*, 386.)
6. **CHALLENGING JUROR—PRACTICE—CRIMINAL LAW.**—Under our Criminal Practice Act the method of impaneling a trial jury in a criminal action is different from that of impaneling a trial jury in a civil case under our Code of Civil Procedure. In a criminal action the court may require the parties to exercise all their challenges peremptorily, or for cause, and the juror, if accepted, be sworn to try the cause as each juror appears and before another is called, or may, in its discretion, allow the clerk to draw from the box twelve names before any challenges are interposed, and after these are examined for cause and passed upon draw others to take the place of those excused and allow the parties to examine and pass upon all thus called before exercising their peremptory challenges, provided that in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted for cause at the time of taking recess or adjournment, and those not excused be sworn to try the cause and thus placed under the control of the court. (*People v. Knok Wah Choi*, 90.)
7. **SAME.**—The court may, for good cause shown, permit a challenge, either peremptory or for cause, to be taken after a juror is sworn and before the jury is completed. (*People v. Knok Wah Choi*, 90.)

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**JURY (Continued).**

8. **CRIMINAL PRACTICE—CHALLENGE TO PANEL.**—The intentional omission of the sheriff to summon a juror duly drawn is a good cause of challenge to the panel of the trial jury. (Criminal Practice Act, sec. 322.) (People v. Armstrong, 298.)
9. **EXCEPTION TO CHALLENGE—EFFECT.**—An exception to the challenge to the panel admits the facts stated therein. Such exception in our criminal practice has the same relation to the denial of the challenge as a demurrer to a complaint has to the denials in the answer in our civil practice. (People v. Armstrong, 298.)
10. **MISCONDUCT OF JUROR.**—Where affidavits as to the misconduct of a juror are conflicting, the ruling of the court below denying a new trial will not be disturbed. (People v. Biles, 114.)
11. **IMPROPER CONDUCT OF PARTY—INFLUENCING JURY—GROUND FOR REVERSAL.**—A judgment in favor of a party guilty of improper conduct calculated to influence the jury, or any juror, in their favor in rendering the verdict, should be reversed and a new trial granted on the ground of public policy. (Palmer v. Utah & Northern Ry. Co., 315.)

See Courts, 3; Trial.

**JUSTICE OF PEACE.**

1. **PRO FORMA JUDGMENT—APPEAL FROM.**—A complaint is filed in the justice's court alleging defendant is indebted to plaintiff in the sum of \$150. Defendant files an answer denying the indebtedness. Justice has jurisdiction only in sums of \$100. Defendant consents that judgment may be entered against him as prayed for simply to expedite an appeal. District court dismisses the appeal. Held, that the judgment must be reversed, and tried in the district court. (Harvey v. Bunker Hill etc. Min. Co., 765.)
2. **PRACTICE—APPEALS FROM JUSTICE COURT—JURISDICTIONAL PREREQUISITES.**—To effectuate an appeal from a judgment of a justice of the peace three things are required: The filing of the notice of appeal with the justice; the service of a copy of the same on the adverse party, and the filing of the undertaking; and all these things must be done within thirty days after the rendition of the judgment and are jurisdictional prerequisites; but the mere order in which they are done is not material. (Salt Lake Co. v. Gillman, 195.)
3. **SAME.**—Where judgment was rendered in a justice's court on October 2, 1885, and the notice and undertaking on appeal were filed with a justice on the 6th of the same month, and the notice of appeal was served on the 15th of the same month. Held, that the statute was complied with and the appeal well taken. (Salt Lake etc. Co. v. Gillman, 195.)

**JUSTICE OF PEACE (Continued).**

4. **SAME—DISTINGUISHED.**—The statute providing for appeals from justice's and probate courts, and the provisions for appeal from district to the supreme court, considered and distinguished. (*Salt Lake etc. Co. v. Gillman*, 195.)
5. **QUERY—SUFFICIENCY OF UNDERTAKING.**—Where by accident or mistake the respondent is prevented from objecting to the sufficiency of the undertaking within five days after the filing, may such objection be made at any time a substantial defect is ascertained? Material, but not decided. (*Salt Lake etc. Co. v. Gillman*, 195.)
6. **PLEADINGS—SECTION 4841 CONSTRUED.**—Under section 4841 the district court may allow amendments to the pleadings in an action appealed from the justice or probate court. (*Sebree v. Smith*, 359.)

**LAND GRANTS.**

See Public Lands, 4, 5.

**LANDLORD AND TENANT.**

**EQUITY—INJUNCTION—LESSOR AND LESSEE.**—Equity will not aid one in maintaining an interest in leased premises, acquired by him with full knowledge, contrary to the express covenants of the lease against his lessor. (*Aveline v. Ridenbaugh*, 168.)

**LAW OF THE CASE.**

See Courts, 4.

**LEGISLATIVE RECORD.**

See Mandamus.

**LEGISLATURE.**

See Constitutional Law; Mandamus.

**LIENS.**

See Mechanic's Lien.

**LIMITATION OF ACTIONS.**

1. **ACTIONS—LIMITATIONS—BAR OF STATUTE.**—An act limiting the time within which an action may be commenced provided that causes of action which had theretofore accrued might be commenced within the whole time allowed by the statute after its passage. *Held*, that the bar of the statute did not begin to run until the statute took effect. (*Schneider v. Hussey*, 8.)
2. **LIMITATION OF ACTIONS—DOUBT RESOLVED IN FAVOR OF CREDITORS.**—It is a well-settled rule that when there is doubt as to the time

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**LIMITATION OF ACTIONS (Continued).**

when the limitation of an action begins to run under a statute, that construction must be given which is most favorable to the common-law rights of the citizen. (*Schneider v. Hussey*, 8.)

**LUNATICS.**

See Insane Persons.

**MANDAMUS.**

1. **APPLICATION FOR WRIT OF MANDATE.**—The secretary of the territory must receive from the clerks of both branches of the legislature, at the close of each session, all bills and papers belonging to the archives of the respective Houses, and all books of both Houses, and certify to the reception of the same. He is not required nor permitted to receive any documents from any other source. It is not within the scope of *mandamus* to confer power upon those to whom it is directed. It only enforces the exercise of powers already existing, when its exercise is a duty. (*Clough v. Curtis*, 523.)
2. **MANDAMUS—LEGISLATIVE RECORD—CHIEF CLERK—TERRITORIAL SECRETARY.**—Burkhart was Speaker of the House. Reed was chief clerk. At the end of the sixty days, which was the full length of the session fixed by Congress, Speaker Burkhart declared the session closed. Speaker Burkhart and part of the members left the room. Part of the members remained and elected Wheeler a Speaker *pro tem.* and proceeded with the business and passed a number of bills. The clerk made up the proceedings of the day including that under the Speaker *pro tem.* and by him signed, and delivered them to Curtis, secretary of the territory, who received and receipted for them to said clerk. Speaker Burkhart petitions this court to issue a writ of mandate, directing Secretary Curtis to produce the record of the House to the court, that the court direct the record to be amended by the chief clerk to correspond to the facts and permit the said Speaker Burkhart to sign the same as Speaker. Held, that *mandamus* will not lie to inquire into the acts of a legislative body by verbal testimony, and cause its record to be corrected, or if there be no record to make one; and that a legislative journal can only be corrected by the body that made it. (*Burkhart v. Reed*, 503.)
3. **MANDAMUS—IRREGULARITY OF RECORD.**—At the January term, 1889, in a suit between the parties interested in this proceeding, the court rendered a decision that the act under which the case was tried was unconstitutional and void, and reversed the court below, afterward amending the record and dismissing the action. The next day two of the justices ordered the record amended by restoring the word "reversed" for "dismissed" (the latter

**MANDAMUS (Continued).**

amendment alleged to have been made out of term time); *re-mittitur* was sent to court below as cause being reversed by court. Held, that the *re-mittitur* should have been to dismiss the case, and not being so, Havird had no speedy and adequate remedy at law, and *mandamus* was the proper proceeding. (*Havird v. County Commrs. of Boise Co.*, 687.)

4. **RES ADJUDICATA—FRAUD.**—In answer to Havird's application for a writ of mandate, the intervener, Gorman, avers the action is still pending in the district court, and this court is without authority to issue the writ. Held, that the greater portion of the declarations in the answer are *res adjudicata*, and will not be considered by the court. Held, further, that a judicial record cannot be contradicted by parol evidence, although it is elementary that no instrument, record or document is valid or can exist in the face of fraud, corruption or dishonesty, but in this proceeding the applicant is not in a position to assail the record. (*Havird v. County Commrs. of Boise Co.*, 687.)

**MASTER AND SERVANT.**

See Railroads, 3-11.

**MECHANIC'S LIEN.**

**MECHANIC'S LIEN LAW—STRICTLY CONSTRUED.**—The mechanic's lien law must be strictly construed, and cannot extend beyond the express provisions of the statute. (*Bradbury v. Idaho etc. Land Imp. Co.*, 239.)

**MINES AND MINERALS.**

1. **BOUNDARY LINES OF MINING CLAIM.**—Section 2322 of the Revised Statutes of the United States provides, among other things, that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lode or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." (*Gilpin v. Sierra Nevada etc. Min. Co.*, 696.)
2. **LABOR OF WATCHMAN—WORK DONE ON MINE.**—Where mining works are idle, time and labor of a watchman and custodian on the property in taking care of it is labor done on the claim. (*Lockhart v. Rollins*, 540.)
3. **RELOCATION—OWNERS' RIGHTS.**—A party cannot make a valid relocation of lands legally possessed by another, until the owners' rights

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**MINES AND MINERALS (Continued).**

have been abandoned, forfeited or otherwise ended. (*Lockhart v. Rollins*, 540.)

4. **MINING TUNNEL—RIGHTS OF LOCATOR—CLAIMS LOCATED ON LINE OF TUNNEL—DILIGENCE OF TUNNEL OWNER.**—A tunnel located and run for the development of veins or lodes, pursuant to the provisions of section 2323 of the Revised Statutes of the United States, becomes a mining claim, and entitles the owner thereof to make an adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence, such tunnel owner is entitled to proceed under the provisions of section 2326 of the Revised Statutes of the United States. (*Back v. Sierra Nevada etc. Min. Co.*, 420.)
5. **MINING CLAIMS—DISPUTED AREA—EVIDENCE.**—A certain area of mining ground was in dispute between the Stemwinder mining claim and the Emma claim. Each claimed to have made the first valid location to said area. The evidence was conflicting and presented a question of fact for the jury. Plaintiff excepted to certain evidence offered by defendant, in that it seeks to establish the location of a mining claim by parol. The court excluded the evidence. *Held*, the evidence should have been admitted, as it was not improper, and did not tend to prejudice the rights of plaintiff. (*Stemwinder Min. Co. v. Emma Min. Co.*, 456.)
6. **MEASUREMENTS OF MINING CLAIMS—VOID AS TO EXCESS.**—If it is found, upon a survey of a mining claim, that the measurements of the locator are in excess of the area allowed by law, the claim is only void as to the excess. (*Stemwinder Min. Co. v. Emma etc. Min. Co.*, 456.)
7. **MINING CLAIM—ADVERSE CLAIM.**—It is not required in locating a mining claim that well-defined walls shall be developed or paying ore found within them, but something must be found in place, as rock, clay or earth so colored, stained, changed or decomposed by the mineral elements as to mark and distinguish it from the inclosing country, and experienced miners easily recognize it. Where the boundary of a claim is made excessive in size, with fraudulent intent, it is void, or if so large as to preclude innocent error, fraud will be presumed; if the markings are so indistinct that they cannot be easily traced, it will be good ground for filing an adverse claim. (*Burke v. McDonald*, 679.)
8. **MINING CLAIM—PLEADINGS—PRACTICE.**—In proceedings under the Revised Statutes of the United States, sections 2325, 2326, to determine the right of adverse claimant to a mineral location, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but consents to calling a jury and proceeds to trial as in an action at law, and

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**MINES AND MINERALS (Continued).**

both parties adduce their evidence on the questions of fact involved, it is then too late for the plaintiff to move to have the case declared a proceeding in equity, and to have it decided as such, without the intervention of a jury. (*Burke v. McDonald*, 339.)

9. **RIGHT OF POSSESSION OF MINING GROUND—ACTION AT LAW—JURY ALLOWED.**—In proceedings under this act of Congress, the right of possession of the ground in dispute is the gist of the action, the thing to be tried and settled by the controversy, and such proceeding, in this territory, an action at law in which a jury may be demanded as a matter of right to try such controversy, and render a general verdict therein. (*Burke v. McDonald*, 339.)
10. **POSSESSION—WHO ENTITLED TO PATENT—ACTION TO DETERMINE.**—So far as the form of action is concerned, it makes no difference who is in or out of possession. The proceeding is simply to determine which party, if either, is entitled to a patent, and in such a case, where the claim is asserted under a location, actual possession is not a material question. (*Burke v. McDonald*, 339.)
11. **MINING CLAIM—ADVERSE CLAIM—RIGHT TO PATENT—SHOWING TO BE MADE.**—In an action brought under section 2326 of the Revised Statutes of the United States, and the act of 1887, amendatory thereof, in support of an adverse mining claim, it is not enough that one claimant should show a superior right or title, as against the other, but one must show a clear right, as against the government, to a patent from the United States to the claim in dispute or some part thereof, before either party can prevail in the action. (*Rosenthal v. Ives*, *Lansdale v. Ives*, 265.)
12. **AGENT OF NONRESIDENT OWNERS.**—The undertaking by one on the ground to procure a purchaser for a mining claim, the owner being nonresident of the territory and having no other agents in the territory to look after the claim, constitutes a fiduciary relation of such persons in relation to such property. (*Lockhart v. Rollins*, 540.)
13. **AGENT RELOCATING FOR HIMSELF.**—A person sustaining such fiduciary relation in respect to a mining claim cannot defeat the rights of his principal by relocating it for himself. (*Lockhart v. Rollins*, 540.)
14. **SAME.**—If he so do relocate it, and benefit accrue from such act, the benefit accrues to the owner, and not to the relocater. (*Lockhart v. Rollins*, 540.)
15. **MINING CLAIM—LOCATION BY AGENT.**—Where the complaint alleges that a mining claim was located on behalf of the owner by duly authorized agents, and the answer admits that fact, it is error for the court to refuse to give an instruction to the jury to the effect that one might initiate the location of a mining claim through an agent. (*Schultz v. Keeler*, 568.)



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**MINES AND MINERALS (Continued).**

16. **INSTRUCTIONS—LOCATING CLAIM BY AGENT.**—The instructions given to the jury to the effect that one cannot initiate the location of a mining claim through an agent, etc., examined and held erroneous. (*Schultz v. Keeler*, 333.)
17. **ALIENS CANNOT LOCATE CLAIM.**—Under the act of Congress only citizens of the United States and persons who have declared their intention to become such can acquire any right by location upon mineral lands of the public domain. (*Rosenthal v. Ives, Lansdale v. Ives*, 265.)
18. **FINDINGS—MUST ALLEGE AND PROVE CITIZENSHIP.**—In an action between claimants to determine the right of possession to a mining claim the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that the plaintiffs are citizens, or have declared their intention to become such, and when the action is tried to the court alone all these facts must be found, whether admitted by the pleadings or not. (*Rosenthal v. Ives, Lansdale v. Ives*, 265.)
19. **SAME.**—As there was an omission to find in these cases that plaintiffs were citizens, or had declared their intention to become such, *held*, that the judgment should be reversed and the causes remanded, with direction to the court below to find on this question from the evidence taken at the trial, if sufficient, and if not, upon such evidence as may be adduced, and proceed to render judgment accordingly. (*Rosenthal v. Ives, Lansdale v. Ives*, 265.)
20. **PRACTICE—CITIZENSHIP.**—It is a necessary allegation in a complaint of adverse claim to allege such claim has been filed in the land office, but it does not necessarily follow that it must be proven if not denied, but citizenship must be alleged, proven and found even if it is not denied. (*Burke v. McDonald*, 679.)
21. **MINING LAW—CITIZENSHIP—RIGHT OF POSSESSION.**—Under the act of Congress of May 10, 1872, only citizens of the United States and persons who have declared their intention to become such can acquire any right of possession, by location or otherwise, of mineral lands on the public domain. (*Bohanan v. Howe*, 453.)
22. **SAME—PLEADING.**—In an action for trespass upon mining ground and for damages, where the legal title to the ground is in the United States, and the right of possession is made by the pleadings a material issue, the plaintiff, in order to recover, must plead and prove that he is a citizen of the United States, or that he has declared his intention to become such. (*Bohanon v. Howe*, 453.)
23. **LOCAL CUSTOM OF MINERS AS TO TRANSFERS.**—Evidence of local customs of miners, as to the manner of transfers of interests in mining claims, previous to July 26, 1866, is admissible. (*Lockhart v. Rollins*, 540.)

## MINES AND MINERALS (Continued).

**24. MINES—CUSTOMS AND REGULATIONS OF MINES—PRESUMPTIONS.—**

Miner's customs and regulations once adopted are presumed to be existing and in force until the contrary is proven; and in actions concerning mining claims under section 486 of our Code of Civil Procedure proof thereof must be admitted, and, when not in conflict with the laws of the territory, must govern the decision of the action. (*Riborado v. Quang Pang Min. Co.*, 144.)

See Brokers; Contracts, 3; Corporations, 2; Injunctions, 3-5.

## MISCONDUCT OF COUNSEL.

See New Trial, 1.

## MORTGAGES.

**1. CONVEYANCE—DEED—MORTGAGE—CONSTRUCTION OF CONTRACT.—**A deed absolute on its face given by A to B for real estate therein described, and a bond given by B to A, agreeing to convey to A

a portion of the same property at a stipulated time, although given on the same date and for the same price, if not intended to be a mortgage or security for money by the parties themselves and not appearing to be such on the face of the instrument, will be held to be an absolute bargain and sale, and not a mortgage. (*Winters v. Swift*, 61.)

**2. PLEADING—FORECLOSURE OF MORTGAGE.—**In an action to foreclose a mortgage it is not necessary to allege in the complaint notice to the mortgagor that the plaintiff has elected to consider the whole sum due for default in payment of installments or interest. (*Broadbent v. Brumback*, 366.)**3. ATTORNEY'S FEE—REASONABLE ALLOWANCE.—**A stipulation in a mortgage for allowance for an attorney's fee in case of foreclosure is valid, but should be enforced only for a reasonable amount. In determining what amount is reasonable the court should allow no more than is actually received or contracted for by the attorney for his services. (*Broadbent v. Brumback*, 366.)

See Chattel Mortgages.

## MOTIONS.

See Appearance.

## MUNICIPAL CORPORATIONS.

**NEGLIGENCE—DEFECTIVE STREET.—**Where an injury occurs to the plaintiff on the Sabbath day, through the negligence of the defendant in not keeping its streets in proper condition, *held*, that the plaintiff was not required to show that he was engaging in a work of

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**MUNICIPAL CORPORATIONS (Continued).**

necessity at the time of the accident in order to entitle him to recover, and a motion for nonsuit on that ground was properly overruled. (*Black v. City of Lewiston*, 276.)

**MURDER.**

See Homicide.

**NEGLIGENCE.**

1. **NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**—A person guilty of negligence cannot avoid responsibility therefor on the ground that others are also guilty of negligence contributing to the same injury. (*McCarty v. Boise City etc. Co.*, 245.)
2. **CONTRIBUTORY NEGLIGENCE.**—Where a suit is brought against a railway company to recover damages for injured property, by reason of the negligence of the agent or servants of the company, and defendant relies on such contributory negligence of the plaintiff or his servants as to prevent a recovery, this is a defense to be established by the defendant. (*Hopkins v. Utah Northern Ry. Co.*, 300.)

See Municipal Corporations; Railroads, 3-11.

**NEGOTIABLE INSTRUMENTS.**

See Bills and Notes.

**NEW TRIAL.**

1. **MISCONDUCT OF COUNSEL.**—Misconduct of counsel in asserting the falsity of the testimony of a witness in the presence of the court, jury, the defendant and his counsel, is not of itself sufficient to entitle the defendant to a new trial. (*People v. Biles*, 114.)
2. **MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE NOT GROUND TO JUSTIFY.**—Insufficiency of the evidence to justify the judgment, and objections to the judgment as being contrary to law, are not grounds upon which a motion for a new trial can be granted. (*Curtis v. Walling*, 416.)
3. **CUMULATIVE EVIDENCE.**—Newly discovered evidence which is merely cumulative is not ground for new trial. (*People v. Biles*, 114.)
4. **NEW TRIAL—AFFIDAVIT OF NEWLY DISCOVERED EVIDENCE—INSUFFICIENT JURAT.**—Where an affidavit was produced and read in the district court, without objection, on motion for a new trial, on the ground of newly discovered evidence, and an objection is made in this court that the same is insufficient and void for want of a sufficient jurat, *held*, that this court will not consider the objection that it should first have been made in the court below. (*Heilner v. Brown*, 263.)

**NEW TRIAL** (Continued).

5. **SAME.**—An order for a new trial on the ground of newly discovered evidence, being largely discretionary with the trial judge, *held*, this court will not disturb the same, unless appellant shows an abuse of such discretion. (*Heilner v. Brown*, 263.)

**NONSUIT.**

1. **NONSUIT—A FINAL JUDGMENT.**—A judgment of nonsuit is a final judgment within the meaning of our code, from which an appeal will lie. (*Lalande v. McDonald*, 307.)
2. **NONSUIT.**—Where there is evidence to support the case a nonsuit will not be granted. (*Black v. City of Lewiston*, 276.)
3. **ACTION TO RECOVER REAL ESTATE—SECTION 2326 OF THE REVISED STATUTES OF THE UNITED STATES CONSTRUED.**—Where an action to recover specific real property is brought pursuant to section 2326 of the Revised Statutes of the United States, and there is no evidence for the consideration of the jury, a nonsuit may be granted. (*Lalande v. McDonald*, 307.)
4. **NONSUIT—TESTIMONY—ELECTIONS.**—When a motion for nonsuit is made by the defendant at the close of plaintiff's testimony, because of its insufficiency and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed. (*Chamberlain v. Woodin*, 642.)

See Criminal Law, 8.

**NOTICE.**

See Appeal and Error, 41-46; Appearance.

**NUNC PRO TUNC.**

See Judgments, 3.

**OATHS.**

See Elections, 3, 10.

**OFFICERS.**

1. **FEES—SALARY—DE FACTO OFFICER—DE JURE OFFICER.**—But for the fact that the statute (Rev. Stats., sec. 380) preserves the salary for the *de jure* officer, and forbids the issuance of a warrant pending the suit, the *de facto* officer would be entitled to both the salary and fees of the office, and if declared to belong to another, would be required to pay the same to the one found entitled, but even then the *de facto* officer would be entitled to his necessary expenses incurred in earning the fees and emoluments received. (*Havird v. County Commrs. of Boise Co.*, 687.)

**OFFICERS (Continued).**

2. **ACTION TO TRY TITLE TO OFFICE—LEGAL NOT EQUITABLE.**—An action under act of January 30, 1885, to try title to an office, to which there are several claimants is one of legal and not of equitable cognizance. The issues in such action or proceeding are legal ones, and the trial of such issues by a jury is a constitutional right of the party. (*People ex rel. Gorman v. Havird*, 531.)
3. **ACT UNCONSTITUTIONAL.**—That part of section 536 of said act providing that actions of this nature "shall be tried by the judge of the district court at chambers," and without the intervention of a jury, held, to be unconstitutional and void. (*People ex rel. Gorman v. Havird*, 531.)

See Constitutional Law, 3-5; Elections; Judges; Sheriffs and Constables.

**PAROL EVIDENCE.**

See Evidence.

**PARTIES.**

1. **TITLE OF ACTION—INTERESTED PARTIES.**—Courts will look beyond the mere title of an action or proceeding for the purpose of determining who are interested and affected as parties. (*Van Camp v. Board of Commrs. etc.*, 29.)
2. **DEATH OF PARTY—SUBSTITUTION.**—After judgment was rendered, and before notice of appeal was filed or served, one of the defendants died, no substitution having been made; held, that all proceedings on the appeal were null and void as to the representatives of the deceased defendant. (*Coffin v. Edgington*, 627.)

See Counties.

**PARTNERSHIP.**

**PARTNERSHIP—PROOF OF.**—Evidence of common report should only be admitted to prove partnership in connection with the further evidence that such report was known to the parties sought to be charged. (*Gaffney v. Hoyt*, 199.)

**PASTURING.**

See Public Lands, 3.

**PERJURY.**

**PERJURY—SUFFICIENCY OF INDICTMENT.**—Where an indictment states the defendant on his oath "falsely, wickedly, and feloniously did say, swear, etc.," is sufficient where a person is charged with the crime of perjury. (*Territory v. Anderson*, 573.)

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PLEADING AND PRACTICE.

1. **PRACTICE.**—An allegation in the complaint not denied in the answer is sufficient to sustain a finding that the facts stated therein are true. (*Broadbent v. Brumback*, 366.)
2. **GENERAL DENIAL—UNVERIFIED COMPLAINT.**—A complaint by a public officer, in his official capacity, need not be verified, but the answer to it must be verified, unless it also be by a public officer in his official capacity, but if the complaint be not in fact verified, a general and not specific verified answer may put in issue the main allegations of the complaint under section 4183 of the Revised Statutes. (*United States ex rel. McDonald v. Shoup*, 493.)
3. **PLEADING—VERIFICATION—PRACTICE.**—Under our practice, generally, where the complaint is not verified, a general denial by defendant puts in issue the substantive allegations of the complaint, but where the action is brought upon a written instrument, and a copy of such instrument is set out or annexed to the complaint, the genuineness and due execution of the instrument are deemed admitted unless the answer specifically denies the same and is verified. (*United States v. Alexander*, 386.)
4. **PLEADING—SPECIAL DEMURRER.**—Defects in pleading which make uncertain are special grounds of demurrer under our code, which cannot be taken advantage of on general demurrer. (*Palmer v. Utah and Northern Ry. Co.*, 315.)
5. **PRACTICE—DEMURRER.**—Where the record shows that a general demurrer was filed, but is silent as to any disposition of the same, the presumption will be indulged on appeal that the demurrer was overruled or abandoned. (*United States v. Alexander*, 386.)
6. **ISSUES OF LAW AND FACT.**—When there is both a demurrer and answer to the same complaint, raising both an issue of law and fact, the issues of law should be first determined. (*Guthrie v. Phelan*, 95.)
7. **ANSWER—INCONSISTENT DEFENSES—DEMURRER—MOTION TO STRIKE.**—An objection that the answer contains inconsistent defenses cannot be made by demurrer, but by motion to strike out, or to require the defendant to elect upon which defense he will stand. (*Caldwell v. Ruddy*, 1.)
8. **PLEADINGS—SHAM ANSWER—TEST.**—An answer taking issue only on an immaterial issue of the complaint is frivolous, and may be stricken out on that ground. Falsity is the test of a sham answer, and where shown to be sham by this test may be stricken out. (*Goldstein v. Krause*, 294.)
9. **ANSWER—STRIKING FROM FILES.**—Where an answer is irrelevant it may, on motion, be ordered stricken from the files. (*Guthrie v. Fisher*, 111.)

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**PLEADING AND PRACTICE (Continued).**

10. **DEMURRER—WAIVER—PRACTICE ON APPEAL.**—Where defendant demurred to the complaint in the trial court, but afterward waived such demurrer, he cannot have the same considered upon appeal. (Guthrie v. Phelan, 95.)

See Appeal and Error; Equity; Findings; Instructions; Trial.

**PLEDGE.**

1. **PLEDGE AS COLLATERAL SECURITY.**—When a party takes any property as a pledge for the security of a debt, which through his gross neglect is lost, he must bear the loss, and he must exercise ordinary diligence in all cases. (Murphy v. Bartsch, 636.)
2. **CONTRACT BETWEEN THE PARTIES.**—When there is none as to the disposition to be made of the pledge, and the pledgor claims it is lost by neglect, he must show the neglect and the damage resulted to him therefrom. (Murphy v. Bartsch, 636.)

**PREFERRING CREDITORS.**

See Insolvency.

**PRINCIPAL AND AGENT.**

See Brokers; Mines and Minerals, 12-16.

**PRINCIPAL AND SURETY.**

See Appeal and Error, 47-50; Attachment, 4; Bills and Notes, 4.

**PROBATE COURT.**

See Executors and Administrators; Judges.

**PROCESS.**

**DEFECTIVE SUMMONS.**—Where a summons is irregular or defective, the remedy, if any, is by application to the trial court, to quash or set aside. (Parke v. Wardner, 285.)

**PROMISSORY NOTES.**

See Bills and Notes.

**PROSTITUTION.**

See Disorderly Houses.

**PUBLIC LANDS.**

1. **IMPROVEMENTS—PUBLIC LANDS—SALE—CONSIDERATION.**—Improvements upon the public lands are lawful subjects of sale and are a

## PUBLIC LANDS (Continued).

sufficient consideration to support promissory notes and other contracts. (*Caldwell v. Ruddy*, 1.)

2. **POSSESSORY CLAIM TO PUBLIC LANDS.**—Where a party purchases the right of possession of persons, who had located and settled upon agricultural land belonging to the United States, and thereafter resided constantly upon the same, and was qualified in law to initiate proceedings to obtain title thereto, held, that the party is the owner of the land against all persons except the United States. (*Washington & Idaho R. R. Co. v. Osborne*, 557.)
3. **PASTURING PUBLIC LANDS.**—The fact that a party has pastured the public lands of the United States without claim of title, or connecting himself therewith under some of the possessory acts, will not give a legal or equitable right to the pasture grown thereon. (*McGinnis v. Freidman*, 393.)
4. **LANDS GRANTED TO NORTHERN PACIFIC RAILWAY COMPANY BY CONGRESS—LAW CONSTRUED.**—Section 3 of the act of Congress of July 2, 1864, provides: "That there be and thereby is granted to the Northern Pacific Railroad Company (for the purpose of securing the construction of a railroad and telegraph, etc.) every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt, . . . free from pre-emption of other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office," etc. *Held*, to be a grant *in praesenti*, and to vest in the company an equity in the lands, subject to be defeated, however, on noncompliance with terms of the grant. (*Washington etc. Ry. Co. v. Northern Pac. Ry. Co.*, 550.)
5. **ACT OF CONGRESS OF MARCH 3, 1875.**—Held, also, that lands included in such grant are not within the operation of the act of March 3, 1875, granting the right of way to railroads, etc. (*Washington etc. Ry. Co. v. Northern Pac. Ry. Co.*, 550.)

See Indian Lands.

## RAILROADS.

1. **RIGHT OF WAY—COMPENSATION.**—The plaintiff railroad corporation has no right of way over defendant's land, and cannot enter upon it and take it from the possession of defendant without due compensation. (*Washington & Idaho R. R. Co. v. Osborne*, 557.)
2. **INJUNCTION—RIGHT OF WAY—ACTION AT LAW.**—Where a railroad prays for a perpetual injunction against another railroad, enjoining the entering upon its right of way and for a decree of title, and it appears at the time of trial the defendant has completed its line of road over the disputed ground and is in the



**RAILROADS (Continued).**

actual occupation and use of the same, held, the court was right in refusing a judgment of perpetual injunction, but should not have passed upon the title, leaving the plaintiff to his action at law. (*Washington etc. Ry. Co. v. Coeur D'Alene Ry. etc. Co.*, 580.)

**3. RAILROAD CORPORATION—NEGLIGENCE—SERVANTS—FELLOW-SERVANTS.**

A railroad corporation is liable for damages to employees injured through the negligence of their agents or servants who are invested with a controlling or superior duty in the management of the business of the corporation. (*Palmer v. Utah & Northern Ry. Co.*, 315.)

**4. MASTER AND SERVANT—RULE OF DAMAGES.—**

Where a fireman upon a locomotive engine in discharge of his duty, with full knowledge of the nature and extent of the dangers of the service he is engaged in, or has the means of being informed of such facts and conditions by the exercise of ordinary care, voluntarily assumes such risks, and is thereby injured, and the employees are guilty of no laches or misconduct unknown to the servant, or which with ordinary care he might have known, he cannot recover for such injury. (*Drake v. Union Pacific Ry. Co.*, 487.)

**5. MASTER AND SERVANT—RISKS.—**

The traveling auditor of a railroad company, whose duties are to travel on the company's cars from stations on its roads and audit accounts, is a servant of the company's, and assumes the ordinary risks incident to the employment. (*Minty v. Union Pac. Ry. Co.*, 471.)

**6. SAME—ACCIDENT—PRESUMPTION.—**

Where such servant is injured in an accident resulting in the derailment of the car on which he is riding, it will be presumed, until the contrary is shown, that the company was not in fault in providing suitable instrumentalities for the business, and had no notice of any defect or other causes of the accident. (*Minty v. Union Pac. Ry. Co.*, 471.)

**7. WHAT PARTY INJURED MUST SHOW.—**

Before the servant can recover, he must show that the injury did not arise from a defect obvious to himself, or which, by the exercise of ordinary care, he might have known. (*Minty v. Union Pac. Ry. Co.*, 471.)

**8. HAZARD OF BUSINESS.—**

He must show it was not from hazard incident to the business. (*Minty v. Union Pac. Ry. Co.*, 471.)

**9. CHARGES TO THE JURY.—**

Where the judge charged the jury that, if the car was overturned by reason of any defect in said car, or of the track on which it was running, this is in itself presumptive evidence of neglect on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever, *held*, that as between master and servants such presumption of negligence does not so arise, and the charge was erroneous. (*Minty v. Union Pac. Ry. Co.*, 471.)

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RAILROADS (Continued).

10. **SAME.**—The court also charged, while the burden of proof is on the plaintiff to show negligence of the defendant, yet it is sufficient for that purpose, *prima facie*, if he show he suffered injury without his fault, while lawfully traveling in the car of the defendant, and that the cause of that injury was probably the negligence of the defendant, *held*, to be error, and that whether it is so or not is in the knowledge of the defendant, and the defendant must then show what the real cause of the injury was, and if the defendant does not choose to give the explanation, the jury will be authorized to find that the real cause of injury was the negligence of the defendant in the particular case specified in the complaint, *held*, that this was error. (*Minty v. Union Pac. Ry. Co.*, 471.)
11. **RESPONSIBILITY OF RAILROAD—CANNOT AVOID.**—A railroad company cannot avoid the responsibility of operating its road by allowing others to have the control and management of its roadbed or trains without the consent of the power whence it derives its franchises. (*Palmer v. Utah & Northern Ry. Co.*, 382.)

See Taxation, 3.

## RAILWAY LAND GRANTS.

See Public Lands, 4, 5.

## REAL ESTATE BROKER.

See Brokers.

## REASONABLE DOUBT.

See Criminal Law, 4.

## RECEIVERS.

1. **RECEIVER.**—A receiver cannot be sued without first obtaining the permission of the court which appointed him. (*Martin v. Atchison*, 624.)
2. **JUDGMENT CREDITOR—RECEIVER.**—A judgment creditor is without an adequate legal remedy when the title of the defendant's property is clouded by a fraudulent assignment thereof and by another judgment which, though fraudulent, is held a prior lien, and when such property is in the hands of a receiver to be sold for the benefit of such fraudulent judgment. (*Martin v. Atchison*, 624.)

## REFEREE'S FINDINGS.

1. **FINDINGS OF REFEREE—ERROR—AFFIRMATIVE SHOWING.**—The party alleging error in the findings of a referee must make it affirmatively appear. (*Montandon v. Walker*, 165.)
2. **SAME—PRESUMPTION OF CORRECTNESS OF FINDINGS.**—Where appellant fails to show, affirmatively, error in the findings of a referee, the correctness of such findings are presumed, and judgment thereon will be affirmed. (*Montandon v. Walker*, 165.)

## REFORMATION OF INSTRUMENTS.

1. **REFORMATION OF INSTRUMENT SUED ON.**—A bond payable to the people of the United States will not sustain a judgment in favor of the people of the United States of the territory of Idaho. Before such judgment can be allowed, the instrument must be reformed. (*United States ex rel. McDonald v. Shoup*, 493.)
2. **REFORMATION OF CONTRACT.**—To authorize the reformation of a written contract on the ground of mistake, the evidence must leave no reasonable doubt in the mind of the court as to the mistake. The mistake must be mutual, and it must appear that both have done what neither intended. (*Houser v. Austin*, 204.)

## REPLEVIN.

1. **CLAIM AND DELIVERY—FINDINGS.**—In an action of claim and delivery a general verdict, finding for or against either party is sufficient to enable the court to enter judgment thereon for the return of the property when such return is the appropriate remedy. In such actions, where several articles are sought to be recovered, if either party desires a finding of value of each article, they should request that such findings be made, or he cannot take advantage of their failure to do so. (*Johnson v. Fraser*, 404.)
2. **JUDGMENT—CLAIM AND DELIVERY.**—The judgment of the court in an action of claim and delivery, where verdict is given for defendant, should be in the alternative for the return of the property, or its value if a return cannot be had. Where such return is the appropriate remedy, the verdict need not be in the alternative. (*Johnson v. Fraser*, 404.)
3. **FINDING AS TO RETURN OF PROPERTY.**—In such cases, if either party desire a finding for a return of the property, he should request such finding. If he fail to do so he cannot take advantage of failure to do so. (*Johnson v. Fraser*, 404.)
4. **VERDICT—EVIDENCE.**—The verdict of a jury against defendants in an action for the recovery of personal property is conclusive on appeal to the supreme court of the question of ownership, and also upon all the allegations in the complaint material to recovery in the action, if there is any evidence to sustain the verdict. (*Lufkins v. Collins*, 256.)

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**REPLEVIN (Continued).**

5. **FORECLOSURE OF CHATTEL MORTGAGE—SECOND ACTION FOR CLAIM AND DELIVERY PENDING.**—Where an action to foreclose a chattel mortgage has been commenced, and is pending, a second action for claim and delivery by same plaintiffs cannot be maintained. *Held*, such an action rightfully dismissed at plaintiff's costs. (*Cederholm v. Loofborrow*, 191.)
6. **CLAIM AND DELIVERY—DAMAGES FOR USE OF—MEASURE OF DAMAGES.** In an action of claim and delivery, where the property sought to be recovered is valuable for use aside from its intrinsic value, and the prevailing party claimed damages for the loss of its use in his pleadings, the measure of damages is the value thereof and the reasonable value of its use during its detention. In determining value of its use, the taxes which the prevailing party would have paid had he retained possession thereof and the usual and ordinary risk incident to the possession thereof should be considered. (*Sebree v. Smith*, 359.)

**REPUTATION.**

See Criminal Law, 6.

**RES GESTAE.**

See Evidence, 3.

**RESULTING TRUSTS.**

See Trusts.

**RIGHT OF WAY.**

See Railroads, 1, 2.

**RIPARIAN RIGHTS.**

See Waters and Watercourses.

**SALARY AND FEES.**

See Judges; Officers.

**SALES.**

**SALE OF CHATTELS—DELIVERY—THIRD PARTIES.**—When property sold in good faith is at the time in the care and custody of the third person, notice to said person of the said sale is sufficient to constitute a delivery as to subsequent purchasers or attaching creditors. (*Lufkins v. Collins*, 150.)

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**SELF-DEFENSE.**

**See Homicide.**

**SENTENCE.**

**See Appeal and Error, 37.**

**SERVICE OF PAPERS.**

**See Appeal and Error, 41-46.**

**SETOFF AND COUNTERCLAIM.**

1. **COUNTERCLAIM—PLEADING.**—A counterclaim alleging a debt due defendant and a former partner, or a stranger to the suit, *held*, to be bad, and a demurrer thereto properly sustained. (*McGuire v. Lamb*, 378.)
2. **SAME.**—A counterclaim which fails to allege that the debt existed at the commencement of the action, but alleges that it is now due, *held*, to be bad and a demurrer thereto properly sustained. (*McGuire v. Lamb*, 378.)

**SHERIFFS AND CONSTABLES.**

1. **SHERIFF.**—Where a sheriff levies on personal property under attachment, and while holding under such levy received a second attachment and levies on the same property under the second attachment, and afterward, but before sale on either, a third person claiming the property, the second attaching creditor indemnifies the sheriff against loss under the second attachment, and the sheriff sells under execution in the first attachment suit and pays all proceeds to the first attaching creditor, the claimant of the property having recovered of the sheriff the value of the property sold, *held*, (1) that the sheriff cannot recover on the indemnifying bond of the second attaching creditor; (2) the complaint not claiming nor the proof showing that after the levy the sheriff did any act under the second attachment, the attaching creditor is not liable; (3) in such case when the plaintiff has rested it is not error for the court to instruct the jury to find for the defendant; (4) in such case, also, the effect of an indemnifying bond must be determined by its own conditions. (*Fury v. White*, 662.)
2. **SUIT AGAINST CONSTABLE—EXECUTION PROPER EVIDENCE.**—Where constable was sued for value of goods seized, *held*, execution proper evidence in his defense, and error in court to exclude the same. (*Pecotte v. Oliver*, 251.)

**SPRINGS.**

See Waters and Watercourses, 1.

**STARE DECISIS.**

See Courts, 4.

**STATUTE OF FRAUDS.**

See Frauds, Statute of.

**STATUTE OF LIMITATIONS.**

See Limitation of Actions.

**STATUTES.**

1. **PASSAGE OF ACT—APPROVAL BY GOVERNOR—STATUTORY CONSTRUCTION.**—The words "passage of the act" in a statute means its approval, or the time when the act takes effect. (*Schneider v. Hussey*, 8.)
2. **PRACTICE—RULE OF COMMON LAW REVERSED.**—Section 3 of our Code of Civil Procedure reverses the rule of the common law that statutes in derogation of the common law must be strictly construed. Under our code such statutes are to be liberally construed with a view to promote justice. (*Darby v. Heagerty*, 282.)

See Constitutional Law; Mandamus.

**STIPULATIONS.**

See Attorney and Client.

**STREETS.**

See Municipal Corporations.

**SUBSCRIPTIONS.**

**GRATUITOUS SUBSCRIPTION—MERE OFFER—NUDUM PACTUM.**—A gratuitous subscription with only one signer is but an offer, which until accepted by the promisee in express terms or by a performance of the conditions stipulated therein is but a *nudum pactum*, and cannot be enforced against the will of the subscriber by suit at law. (*Broadbent v. Johnson*, 325.)

**SUBSTITUTION.**

See Parties.

**SUFFRAGE.**

See Elections.

## SUMMONS.

See Process.

## SURETYSHIP.

See Principal and Surety.

## TAXATION.

1. **TAXES—TAX LEVY.**—Taxes cannot be levied except in the manner and for the purposes designated by law. (Shoup v. Willis, 120.)
2. **STATUTORY CONSTRUCTION.**—Statutes authorizing the levy of special taxes should not be so construed as to extend their meaning beyond the clear import of the words used. (Shoup v. Willis, 120.)
3. **RAILROAD PROPERTY LOCATED OFF RIGHT OF WAY—ASSESSED BY WHOM.**—Where machine and repair shops are situated upon lands other than the right of way, but are connected with the main line of the railroad by sidetrack, *held*, that under section 1463 of the Revised Statutes they should be assessed by the local assessor, rather than by the territorial board of equalization. (Oregon Short Line Ry. Co. v. Yeates, 397.)
4. **INDIAN RESERVATION — ASSESSMENT FOR TAXATION.**—The Fort Hall Indian reservation being a part of, and included within, Idaho territory and Oneida county, the property of the Utah and Northern Railway Company situated thereon is subject to taxation for territorial and county purposes. (Utah etc. Ry. Co. v. Fisher, 53.)
5. **RECOVERING BACK ILLEGAL TAX.**—Taxes illegally assessed and paid may always be recovered, if the collector understands from the payor that the taxes are regarded as illegal and that suit will be instituted to recover them. (Shoup v. Willis, 120.)
6. **PLEADING—SUFFICIENT COMPLAINT.**—The complaint in a suit to recover back an illegal tax paid which avers that the same was paid after notice in writing to the assessor—the defendant—that the tax was illegal and suit would be commenced against him to recover the same, is sufficient. (Shoup v. Willis, 120.)

## TRANSCRIPTS.

**RULES OF COURT—TIME TO FILE TRANSCRIPT.**—A transcript filed on Friday preceding Monday, the first day of the term of this court, is in time under the rules of the court. (Sebree v. Smith, 357.)

See Appeal and Error.

## TRIAL.

1. **PRACTICE—SPECIAL FINDINGS—VERDICT.**—Where there is an inconsistency between the special findings and the general verdict of

**TRIAL (Continued).**

- a jury, the special findings control the judgment. (*Bradbury v. Idaho etc. Land Imp. Co.*, 239.)
2. **SPECIAL VERDICT OF A JURY.**—It is the province of the court to determine as to what particular facts the jury shall find specially, and neither party has the right to dictate the terms of any particular question which the court may deem proper to submit to the jury. (*Lufkins v. Collins*, 256.)
3. **SUBMISSION OF SPECIAL ISSUES TO JURY.**—Section 4397 of the Revised Statutes leaves it optional with the jury in certain designated cases to find a general or special verdict. Where the issues are numerous, and their nature such as likely to confuse a jury, the court should insist on a special verdict, and should formulate issues into separate, distinct propositions, in logical, concise questions, and if it is not done the appellate court is warranted in holding it cause for reversal. (*Burke v. McDonald*, 679.)
4. **VERDICT.**—The verdict of the jury may be corrected in a matter of form by the order of the court, in the presence of the jury, before they are discharged, the jury assenting thereto. (*People v. Biles*, 114.)
- See Findings; Instructions; Jury; New Trial; Nonsuit.

**TROVER AND CONVERSION.**

**WRONGFUL CONVERSION—DAMAGES—JUDGMENT BY DEFAULT.**—In an action for the wrongful sale of personal property, and the wrongful conversion of the proceeds thereof, it is error for the clerk to enter a final judgment, as upon default, but the plaintiff in such case should go into court and prove his damages. (*Parke v. Wardner*, 285.)

**TRUSTS.**

**RESULTING TRUST—WHEN RAISED.**—A resulting trust is raised only when there is fraud in the acquisition of title, or where the money of one is used to pay for real property, the title to which is taken in the name of another at the time said title is taken, and neither a promise to pay nor after-payment will give rise to such a trust. (*Motherwell v. Taylor*, 254.)

**ULTRA VIRES.**

See Corporations.

**USURY.**

**LEX LOCI—QUESTION OF USURY.**—The question as to whether a note which is made and delivered in Utah is usurious or not is to be decided by the laws of Utah. (*Winters v. Swift*, 61.)



**VENDOR AND VENDEE.**

**VERBAL TRANSFERS—CHANGE OF POSSESSION.**—Verbal transfers, if followed by change of possession, are valid as transferring claimant's interest. (*Lockhart v. Rollins*, 540.)

**VERDICT.**

See Findings; Trial.

**VERIFICATION.**

See Pleading and Practice.

**VOLUNTARY ASSIGNMENTS.**

See Insolvency.

**VOTERS.**

See Elections.

**WATERS AND WATERCOURSES.**

1. **SPRINGS—SOURCES OF SUPPLY.**—Rights cannot be acquired to the waters of springs situate along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out and thereby increasing the water supply, as against prior appropriators in good faith, of the whole of the waters of the stream. (*Malad Valley Irr. Co. v. Campbell*, 411.)
2. **QUERY.—WHETHER ONE CAN** bring water from another independent source into a natural stream, whose waters have been appropriated, and use the channel of such stream to conduct the water thus brought into another point, to be there diverted and used. Suggested, but not decided. (*Malad Valley Irr. Co. v. Campbell*, 411.)
3. **PRIOR APPROPRIATION OF WATER.**—Prior appropriation of all the waters of a stream applied to a useful purpose gives the better right to the tributaries and all the direct and immediate sources of supply of the stream, and when this right once vests it must be protected and upheld. (*Malad Valley Irr. Co. v. Campbell*, 411.)
4. **PRIOR APPROPRIATION OF WATER—RIPARIAN RIGHTS—SALE OF WATER BY APPROPRIATOR.**—Under the law of the territory and of Congress, it has become the settled law that the prior appropriator of water has the better title thereto. (*Drake v. Earhart*, 750.)
5. **RIPARIAN RIGHTS.**—A riparian proprietor whose claim to the use of water of a stream flowing through his land not based upon appropriation under the territorial laws is inferior to that of a prior appropriator. (*Drake v. Earhart*, 750.)

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**WATERS AND WATERCOURSES (Continued).**

6. **SALE OF WATER BY PRIOR APPROPRIATOR.**—Water legally appropriated may be sold by the owner for other useful purposes when it appears no more was appropriated than the owner could put to a beneficial use. (*Drake v. Earhart*, 750.)
7. **IRRIGATING DITCH—TENANTS IN COMMON—CONTRACT—RESCISSION—DAMAGES—PART PERFORMANCE.**—Where four persons owned in common a water ditch, and while in joint possession and use of the waters thereof said tenants in common entered into an agreement in writing with A., agreeing that if A. would do certain work in enlarging and improving the ditch, that he should have an interest therein, and right to use water therefrom. A. entered upon the performance of his contract, and did work upon the ditch, to the value of fifty dollars, and began to use water from the ditch, and was proceeding to complete his contract when he was stopped by the owners, including the persons with whom he had contracted, and who declared the contract rescinded, whereby A. was prevented by them from the completion of his work. No reason was assigned for the attempt to rescind, and no offer to pay for the work done. A. insisted upon his contract and right to use the water under it, and continued to use the water from the ditch. Thereupon the owners, including the contracting persons, brought a joint action in trespass against A. for wrongful use of the water from the time he entered. *Held*, (1) that the defendant's acts did not constitute trespass, and that the plaintiffs cannot recover; (2) that a party to a valid contract, in the absence of fraud or other special reason, cannot rescind at pleasure; (3) that where there has been part performance, a party cannot rescind and still retain the benefits received under the agreement. (*Bowman v. Ayers*, 465.)
8. **IRRIGATION—OVERFLOW OF WATER FROM DITCH—INJURY TO ADJOINING LAND—LIABILITY.**—A person owning a ditch from which water escapes upon the premises of the adjoining owner, allowing such water to continue to escape from his ditch after notice, without any effort to prevent the same, cannot escape the liability for damages done thereby on the ground that the adjoining land owner might, at a slight expense, have prevented any damage by digging a ditch on his land that would have conducted said water off his premises. (*McCarty v. Boise City etc. Co.*, 245.)

**WITNESSES.**

1. **EVIDENCE.**—The provision of our Code of Civil Procedure, section 897, that "the credibility of witnesses may be drawn in question by evidence affecting their character for truth, honesty and integrity, is simply declaratory of the common law, and establishes no new rule for the impeachment of witnesses." (*People v. Barnes*, 161.)

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**WITNESSES (Continued).**

2. **INSTRUCTION—WITNESSES.**—An instruction as to the credit that should be given to a witness, and one that the same weight should be given to the testimony, of defendant when corroborated, as to that of any other witness, invades the province of the jury and is properly refused. (*People v. Pierson*, 76.)
3. **EVIDENCE.**—Where a person is proved to have caused a witness to have absented himself from the trial, the presumption arises that the evidence of the witness, if given, would be against his interest. (*Houser v. Austin*, 204.)
4. **RULE OF EVIDENCE.**—It is a general rule that the defendant should not open the defense by cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court. (*Hopkins v. Utah Northern Ry. Co.*, 300.)
5. **ATTORNEYS AS WITNESSES FOR CLIENT.**—Attorneys should offer themselves as witnesses for their clients only in case of extreme necessity. (*Sebree v. Smith*, 359.)

See Criminal Law, 5.

**WRIT OF ERROR.**

See Appeal and Error, 4; Elections, 7.

*Ex. 1-11*  
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